TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 508.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, ET AL., PLAINTIFFS IN ERROR,

vs.

CITY OF DETROIT, THE BOARD OF PUBLIC WORKS OF DETROIT, D. W. H. MORELAND, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED DECEMBER 13, 1900.

(17,993.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 24, 1901.

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

To the circuit court for the county of Wayne, in chancery:

Your orators, The Cass Farm Company, Limited, a partnership association organized and existing under the laws of the State of Michigan; J. O. Harris, Bryant Walker, Jessie W. Radcliffe and Bryant Walker, administrator of the estate of Joseph A. Moross, deceased, on behalf of themselves and of any and all other persons interested in the subject-matter hereof and who may hereafter be joined as parties complainant herein, bring this their bill of complaint against the City of Detroit, the Board of Public Works of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, all of Detroit, Michigan, and the Alcatraz Asphalt Paving Company, and respectfully show unto this court as follows:

1. That the complainants named herein are all residents of Detroit and owners of land lying and abutting upon Second avenue between Colburn place and the south line of the railroad.

2. It appears from the official records of the proceedings of the common council of the city of Detroit, that at the regular meeting held on the 12th day of July, 1898, a communication was received from the board of public works of said city recommending the paving of Second avenue from the end of the present pavement to the boulevard, but which did not specify the kind of pavement to be used; which said communication was accepted and a resolution offered by Alderman Marx that Second avenue be ordered graded and paved from the end of asphalt pavement to the railroad, with asphalt on concrete foundation, and that this action was to be under that clause of the city charter authorizing the common council to annually enter into contracts for grading, paving, etc., of streets, alleys and public places, the cost of which will not exceed in the aggregate $200,000, without the petition of the holders of the larger portion of the real estate directly abutting upon the portions of the street or alley proposed to be improved. That for the purpose of defraying the cost of said paving, the lots and parcels of real estate situated on said Second avenue embraced within said limits and fronting the portion of said avenue ordered to be improved by said paving should be constituted one local assessment district. That the city engineer should report to both the city assessor and the board of public works the quantities of material and work required for such pavement. That as soon as the board should receive this report of the city engineer, said board was thereby authorized to advertise five times for proposals for such pavement, in accordance with the resolutions and proceedings above provided and the provisions of the charter and ordinances of the city of Detroit. This resolution was referred to the city committee on streets.

3. That it further appears by the said official record of the proceedings of the said common council, that at its regular meeting,

held on August 23, 1898, a report of the said committee on streets was made to the said council, recommending the paving of said Second avenue from the end of the present asphalt pavement to the boulevard, and on motion of Alderman Knauss a resolution directing the board of public works to advertise for the paving of Second avenue from the end of the pavement to the boulevard, with asphalt on concrete foundation, was adopted by a vote of eighteen in favor of and ten against the said resolution.

4. It further appears from the said official records, that on August 30, 1898, a communication was received from his honor, the mayor, by the common council, returning, without his approval, the said resolutions. It also appears that at the same meeting the vote by which the resolutions were adopted was reconsidered by a unanimous vote of thirty-one. A motion for the adoption of the same notwithstanding the veto of the mayor, was then carried by a vote of twenty-four in favor to seven against the said adoption.

5. It further appears from the said official records, that supposedly in accordance with the terms of said resolutions and of the charter and ordinances of Detroit, said board of public works caused an advertisement to be made in the official paper for Detroit for proposals for the said paving, which said advertisement was as follows:

"Board of public works office.

"DETROIT, *August* 30, 1898.

"*Proposals for Paving and Repaving Streets.*

"Sealed proposals will be received at the office of the board of public works, Detroit, Michigan, until Tuesday, September 6, 1898, at ten o'clock a. m., local time, for furnishing all the labor and material for grading, paving and repaving, etc., the streets named below, within the limits mentioned, in the city of Detroit, with the style of pavement stated. Second avenue from the south curb line of Colburn place to the south line of the railroad, two roadways thirty feet wide, with sheet asphalt on concrete foundation, Medina, North River blue or Woolmith curbstone.

3 "The following are the estimates in detail of the work to be done on each of the above paving and repaving jobs:

"Second avenue.

"*Assessment Estimates.*

"Excavation, 4,699 cubic yards.

"Curbstone, new straight, 6,046.25 lineal feet.

"Curbstone, circular, 471.20 lineal feet, in 10 Medina circles, 15 feet radius.

"Retaining stone, 75 lineal feet, old Medina curb (furnished by city) may be used, set in concrete 6 inches deep and 8 inches wide.

"Paving, asphalt on concrete, 10,728.12 cubic yards.

"City Estimates.

"Excavation, 1,477 cubic yards.

"Curbstone, new straight, 478 lineal feet.

"Curbstone, circular, 326.56 lineal feet in 20 Medina circles, 10 feet radius, and 2 Medina circles, 4 feet radius.

"Paving, asphalt on concrete, 3,729.60 square yards.

"Retaining stone, 450.50 lineal feet, old Medina curb (furnished by city) may be used, set on concrete 6 inches deep, 8 inches wide."

6. It further appears from said official records that on the 9th day of September, 1898, a communication was received from the board of public works by the common council announcing that it had entered into a contract with the said Alcatraz Asphalt Paving Company, the lowest bidder for the said paving, and asking that said contract should be confirmed and approved. A resolution offered to the effect that it should be confirmed was objected to and laid on the table, but at a special meeting held September 10, 1898, said resolution was passed.

7. It further appeared from the said official records that on the 13th day of September, 1898, a communication was received from the mayor, returning the said resolution without his approval, which said communication was accepted, and on motion of Alderman Marx the vote by which the resolution was adopted was reconsidered by unanimous vote. Alderman Marx then moved the adoption of the resolution, notwithstanding the veto of the mayor. The motion of Alderman Marx then prevailed by a vote of twenty-six in favor of to six against the adoption of said resolution.

4 8. That the ordinance (Revised Ordinances of the City of Detroit, chap. 32, sec. 5, approved November 29, 1869, and as amended July 14, 1894) referred to in the said resolution in favor of the pavement of Second avenue, provides that the board of public works shall, as soon as they receive the report of the city engineer, proceed to advertise fifteen days, unless otherwise ordered by resolution of the common council, in the official city paper, for bids for the making of such improvements and the kind of pavement that shall have been directed to be advertised for by the common council and as required by the city charter, such advertisement to specify a time and place when and where such bids shall be opened, at which time and place such bids shall be opened by the board of public works in the presence of such persons as shall choose to attend, and the board shall then report to the council all bids received for each kind of pavement advertised for, designating the lowest responsible bidder. That no such advertisement as required by this section, specifying time and place where such bids should be opened, has been made by the said board of public works, but, on the contrary, only such advertisement as appears in paragraph 5 of this bill of complaint, specifying only that bids will be received by the board of public works until the 6th day of September, 1898, at ten o'clock a. m., city time.

9. That section 6 of said chapter 32 of the Revised Ordinances of the City of Detroit provides that on presentation of the report of

the board of public works in section 5 above provided, the common council may, by resolution, direct said board to contract with such of the lowest responsible bidders reported by the board as it shall see fit, or direct further advertisement for the same or different kinds of pavement, in its discretion, and then direct said board to contract with such lowest bidder for such kind of pavement as is deemed expedient to adopt for the improvement. Which said provision the board of public works has utterly disregarded, as will appear from the official report of the proceedings of the common council of September 9, 1898, when the communication was received by the common council from the said board of public works naming the lowest bidder and also stating that the board had already entered into a contract with the said lowest bidder and asking the approval and confirmation of the said common council. Yet, notwithstanding that the said section 6 expressly provides that the common council shall, after the board of public works has reported to the council all the bids received for each kind of pavement, direct said board to contract with such of the lowest bidders as it shall see fit, the said board of public works first contracted with the lowest bidder and then reported to the common council the one making such lowest bid.

5 10. That it is expressly provided by section 33, chapter 11, of the charter of the city of Detroit, that in the case of every contract for paving, the work to be performed thereunder shall be commenced and completed between the first day of May and the first day of November in each year. That it is impossible that the said paving of Second avenue from Colburn place to the railroad crossing should be completed in the short space of time between now and the first of November.

11. That on the 13th day of August, 1898, communications were given to the committee on streets of the common council, and also to the city clerk of Detroit, signed by your orators, The Cass Farm Company, Limited, the owners of 1,600 feet on the west side of said Second avenue, being the entire west side of said avenue between Colburn place and the railroad track, and 130 feet on the east side of said avenue, J. O. Harris and others, in which your said orators expressly protested against the paving of Second avenue above Colburn place, on the grounds that asphalt had not been sufficiently tested to prove its value as a pavement; that it is very costly, requiring almost constant repairs; that it is noisy and dusty, and that its durability is a matter of question. Your orators represent the entire west side of said Second avenue between Colburn place and the railroad, and 592 feet on the east side of Second avenue.

12. Further, that a communication signed by your orators, The Cass Farm Company, Limited, J. O. Harris, William Craig, Mrs. D. McDonnell, Mrs. Robert Oakman, Walter Fairbairn, John M. O'Connor, S. A. Buchanan, Lucy M. Arnold, James Arnold, P. T. O'Connor, Moross Estate, H. M. Parmalee, Walker & Radcliffe, and James E. Jacklin, all owners of property situated on Second avenue between Colburn place and the boulevard, was presented to his honor, the mayor, on September 6, 1898, commending his action in vetoing

the said contract and protesting against the paving of said Second avenue with asphalt, a copy of which is hereto attached and made a part hereof (marked Exhibit "A").

13. Your orator further avers, on information and belief, that the said Alcatraz Asphalt Paving Company has begun and is proceeding with the work of grading, paving, and excavating under the said contract before mentioned in this bill.

Wherefore your orators pray:

(1.) That the bid of the defendant Alcatraz Asphalt Paving Company, described in this bill, and the contract made in pursuance thereof between the defendants City of Detroit and the defendants Members of the Board of Public Works on the one part and the defendant Alcatraz Asphalt Paving Company on the other, be declared null and void, as having been made and entered into in contravention of the provisions of law and the Revised Ordinances of said city.

6 (2.) That all the defendants named herein be perpetually enjoined from the execution and carrying out of said contract and from doing any work thereunder.

(3.) That a preliminary injunction be issued restraining all the defendants from executing and carrying out the said contract or from doing any work thereunder until the further order of this court.

(4.) May it please the court, the premises being considered, to grant to your orators the writ of subpœna to be issued out of and under the seal of this court, to be directed to the said City of Detroit, The Board of Public Works, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich and The Alcatraz Asphalt Paving Company, defendants herein, thereby commanding them, and each of them, on a certain day and under a certain penalty to be therein inserted, personally to be and appear before this court, then and there to answer all and singular the said premises, but not under oath (answer under oath being hereby expressly waived), and to stand to, abide and perform such order and decree as this court shall make therein and as shall be agreeable to equity and good conscience.

(5.) And that your orators may have such other, further and different relief in the premises as shall be agreeable to equity and good conscience.

And your orators will ever pray.

CASS FARM CO., LTD.
CHARLES A. RATHBONE,
Ass't Sec'y.

J. O. HARRIS,
BRYANT WALKER,
JESSIE W. RADCLIFFE,
BRYANT WALKER,
Administrator of the Estate of Joseph A. Moross, Deceased,
By RUSSEL & CAMPBELL,
Their Solicitors.

RUSSEL & CAMPBELL,
Solicitors and of Counsel for Complainants.

STATE OF MICHIGAN, }
County of Wayne, } ss:

Charles A. Rathbone, being duly sworn, deposes and says that he is assistant secretary of the Cass Farm Company, Limited; that he has read the foregoing bill by it subscribed and knows the contents thereof, and that the same are true except as to such matters as are therein stated upon information and belief, and as to such matters he believes them to be true.

CHARLES A. RATHBONE.

Sworn to and subscribed before me this 26th day of September, 1898.

HARRY C. BULKLEY,
Notary Public, Wayne County, Michigan.

7 EXHIBIT "A."

DETROIT, MICH., *Sept.* 6, 1898.

To the Honorable W. C. Maybury, mayor of the city of Detroit.

SIR: The undersigned, representing the ownership of all the property on the west side, and all excepting a very few feet on the east side, of that portion of Second avenue proposed to be paved with asphalt, respectfully commend your action in vetoing the resolution of the common council directing the contract for such pavement to be made.

We regret that the council disregarded the forcible and unanswerable reasons which were given in your message. We understand that the contract, if made, must have your approval, and we respectfully petition that you will continue to maintain your position in behalf of the property-owners interested and the best interests of the city by vetoing the contract. We believe that, in view of the situation as it has now become publicly understood, your action in disapproving the contract will be upheld.

There is no necessity for such pavement. The property is outlying property, with a long stretch completely and expensively paved, the burden of which has been borne by the property-owners, and the property has not yet been built up. There is no necessity for the pavement of this portion of the street to furnish a thoroughfare to the country beyond. Woodward avenue, Cass avenue and Greenwood avenue furnish as convenient access to the property beyond the boulevard as can be reasonably demanded.

Asphalt pavement is an experiment yet in this city, and the experience thus far as to its convenience and durability does not argue in its favor; and, in view of the great expense of such a pavement placed in front of undeveloped property, as the tract in question is, it would be an act of the grossest injustice to impose the burden upon the property-owners at this time; and in prospect of the separation of the grades at the important crossings of the railroad track, it would be extravagant at this time to do work at a grade which must of necessity be changed within a short time.

There is no public demand for the pavement, and any citizen viewing the property and inspecting its present use and the development of that neighborhood will fully agree with your honor that there is no need for the paving of that portion of the street.

8 We fully agree with your honor's contention that under the provisions of the Detroit charter, whereby the first paving of the street is paid for by the abutting owners and subsequent maintenance and repair rests upon the city, the dictation of property-owners along a portion of the street which of necessity should be paved, should not be submitted to; but it has always been the custom to pay a reasonable regard to their views, and, as a matter of right, the views of the owners of more than nineteen-twentieths of the front on that portion of the street which is proposed to be paved should receive respectful consideration. In this case the owners of the property on the street in question are not asking for it; the people living east and west of the street are not asking for it; the fire department are not asking for it; the school board are not asking for it; the police department are not asking for it; the health board are not asking for it; over nineteen-twentieths of the owners are protesting against it, and the only influence which is pressing the project is one which should not be regarded.

Yours truly,

CASS FARM CO., LTD.,	1,600	feet, west side.
CHAS. A. RATHBONE, *Ass't Sec'y*,	130	" east side.
J. O. HARRIS,	120	"
WM. CRAIG,	200	"
MRS. D. McDONNELL,	34	"
MRS. ROBERT OAKMAN,		
WALTER FAIRBAIRN,	60	"
JOHN M. O'CONNOR,	40	"
S. A. BUCHANAN,	80	"
LUCY M. ARNOLD,	100	"
JAMES ARNOLD,	240	"
P. F. O'CONNOR,	40	"
MOROSS ESTATE,		
BRYANT WALKER, *Trustee*,	302	"
M. M. PARMALEE,		
By BRYANT WALKER,	40	"
WALKER & RADCLIFFE,	40	"
JAMES E. JACKLIN,	40	"

9 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, Jesse W. Radcliffe, Bryant Walker, Administrator,

vs.

THE CITY OF DETROIT, D. W. H. MORELAND, H. KALLMAN, James W. Millen.

The answer of the defendant-, The City of Detroit, D. W. H. Moreland, H. Kallman, and James W. Millen, to the complainants' bill of complaint.

First. They admit paragraphs one, two, three, four, five, six, seven, eight, eleven, twelve and thirteen of said bill of complaint.

Second. They deny that the board of public works has disregarded or violated sections five and six of chapter 32 of the Revised Ordinances of the City of Detroit, as alleged in paragraph nine of said bill of complaint.

Third. They deny that it is impossible to complete the grading and paving of Second avenue from Colburn place to the railroad crossing before the first of November next, as alleged in paragraph 10 of said bill; on the contrary, they aver that said work will be completed before said time, unless prevented by the injunction of this court.

They aver further that the contract for grading and paving said street provides that the work shall be completed on or before October 31st, 1898. The contractor further agreed to keep the said pavement on Second avenue in good repair for ten years from and after its completion, and has given a good and sufficient bond for the faithful performance of these as well as other conditions of said contract and to pay all damages which may be caused on account of any failure to complete said work within the time limited.

Said contract further provides that the contractor shall forfeit twenty-five dollars for each and every day that said work remained uncompleted after the said 31st day of October.

10 Fourth. These defendants aver that for many years the board of public works has advertised for bids to perform public work in the manner and substantially in the terms of the advertisement set forth in paragraph five of said bill of complaint.

That the office of the board of public works is a public office, and is well known to the public as the place where such bids tendered to the board of public works are always opened. They aver further that on Tuesday, September 6th, 1898, at ten o'clock a. m., local time, the bids for grading and paving Second avenue were publicly opened by the board of public works at its public office and in the presence of all who desired to attend. That it was well known by the public, and especially by all who desired to make tenders that said bids would be opened at said time and place in accordance with the invariable custom of said board. That on Friday, September 9th, said board reported to the common council all the bids received for

the pavement advertised for and designated the lowest responsible bidder.

Fifth. These defendants deny that complainants will in any way be injured by the making of said public improvement, but, on the contrary, will be greatly benefited, and, therefore, they have no standing in a court of equity.

THE CITY OF DETROIT,
By CHAS. FLOWERS,
Corporation Counsel.
D. W. H. MORELAND,
H. KALLMAN, AND
JAMES MILLEN,
By CHAS. FLOWERS,
Corporation Counsel.

CHAS. FLOWERS,
Solicitor for said Defendants.

11 In the Circuit Court for the County of Wayne. In Chancery.

The separate answer of Otto E. C. Guelich and the Alcatraz Asphalt Paving Company to the bill of complaint of the Cass Farm Company, Limited; J. O. Harris, Bryant Walker, Jessie W. Radcliffe, and Bryant Walker, administrator of the estate of Joseph Moross, deceased, complainants, against the City of Detroit, the Board of Public Works of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, and these defendants.

These defendants, saving and reserving all manner of benefit of exception to the complainants' bill of complaint, answering, say that they deny that it is impossible that the said paving of Second avenue from Colburn place to the railroad crossing should be completed in the space of time between now and the first of November, and they aver that it is possible to complete said paving within such time.

These defendants are advised and respectfully submit that the said complainants have not by their bill of complaint made such a case as entitle them to any relief in a court of equity, and they claim the benefit of a demurrer to said bill of complaint.

Wherefore these defendants pray that they may be dismissed with their reasonable costs and charges.

OTTO E. C. GUELICH,
ALCATRAZ ASPHALT PAVING COMPANY,
By JOHN J. SPEED, *Its Solicitor.*

JNO. J. SPEED,
Solicitor and of Counsel for Def'ts O. E. C. Guelich and Alcatraz Asphalt Paving Co.

STATE OF MICHIGAN, } ss:
County of Wayne, }

On this 28th day of September, 1898, before me personally appeared Otto E. C. Guelich and made oath that he had read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

ROBERT T. SPEED,
Notary Public, Wayne County, Michigan.

12 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED, ET AL., Complainants, vs. THE CITY OF DETROIT ET AL., Defendants. } Amendment to Bill of Complaint.

23. Your orator further shows that prior to the adoption of the resolution mentioned in the second paragraph of this bill, no detailed estimate of the cost of the proposed improvement was reported to or furnished the common council, as required by sec. 12, chap. 15, of the charter of the city of Detroit; and, as your orator is informed and believes, and charges, no plans or specifications of the proposed improvement were prepared prior to the adoption of said resolution by the board of public works or approved by the common council; nor had the matter of the proposed improvement been referred in any manner whatsoever by said common council to said board of public works.

CASS FARM CO., LIMITED.
CHARLES A. RATHBONE, *Ass't Sec.*

STATE OF MICHIGAN, } ss:
County of Wayne, }

Charles A. Rathbone, being duly sworn, deposes and says, that he is assistant secretary of the Cass Farm Company, Limited; that he has read the foregoing amendment and knows the contents thereof, and that the same is true except as to such matters as are therein stated upon information and belief, and as to such matters he believes it to be true.

CHARLES A. RATHBONE.

Subscribed and sworn to before me this 29th day of September, 1898.

HARRY C. BULKLEY,
Notary Public, Wayne County, Michigan.

13 At a session of the circuit court for the county of Wayne, held at the court-rooms, in the city of Detroit, on the 3rd day of October, 1898.

Present: Hon. William E. Grove, circuit judge.

THE CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT Walker, Jessie W. Radcliffe, and Bryant Walker, Administrator of the Estate of Joseph A. Moross, Deceased, Complainants,

vs.

THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS OF THE City of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Asphalt Paving Company, Defendants.

A motion having been made that the injunction issued herein be dissolved, and the same having been argued by counsel for the respective parties, it is now, on motion of John J. Speed, solicitor for the defendants Otto E. C. Guelich and The Alcatraz Asphalt Paving Company, ordered that the injunction issued herein be dissolved and vacated. It is further ordered that the said last-named defendants do recover from said complainants ten dollars, the costs of said motion.

WILLIAM E. GROVE,
Circuit Judge.

14 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

CASS FARM COMPANY, LIMITED, ET AL.

vs.

THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, ET AL.

Amended Answer.

The defendants The City of Detroit, The Board of Public Works, D. W. H. Moreland, H. Kallman, James W. Millen, for answer to the paragraph amending the complainants' bill of complaint, and for amendment to their answer heretofore filed herein, say:

First. That on July 12th, 1898, the board of public works of the city of Detroit sent to the common council the following communication:

To the honorable the common council:

GENTLEMEN: The board of public works in recommending the paving of Second avenue from the end of the present asphalt to the boulevard under the $200,000 clause of the charter, has in view the following facts: There exists a strong necessity for the paving of the street because the paving now on the street ends at a dirt street; also for the reason that it is the only north and south street in that part of the city which runs directly to the boulevard, with the exception of Woodward avenue itself, with its double line of street-car tracks, and for the further reason that a great many prominent

property-owners on Second avenue ask to have it paved with asphalt from the end of the present asphalt to the boulevard.

The remainder of Second avenue is now paved with asphalt; and this portion proposed to be paved will have double roadways and the spaces between may be beautified and made into parks.

The city is about to open Second avenue north of the boulevard at great expense, and the new Central high school is already located on the same street, and the board believes that the imperative necessity for this improvement will be apparent to all.

For these reasons the board recommends the paving of the street as indicated above.

Estimated cost, $40,000.

Respectfully submitted.

D. W. H. MORELAND.
JAMES W. MILLEN.
THE CITY OF DETROIT,
By CHARLES FLOWERS,
Corporation Counsel.
D. W. H. MORELAND,
H. KALLMAN, AND
JAMES MILLEN.
By CHARLES FLOWERS,
Corporation Counsel.

CHAS. FLOWERS,
Solicitor for said Defendants.

15 In the Circuit Court for the County of Wayne. In Chancery.

The amended answer of Otto E. C. Guelich and The Alcatraz Asphalt Paving Company to the bill of complain*ant* of The Cass Farm Company, Limited; J. O. Harris, Bryant Walker, Jessie W. Radcliffe, and Bryant Walker, administrator of the estate of Joseph A. Moross, deceased, complainants, against The City of Detroit, The Board of Public Works of the City of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, and these defendants.

These defendants, for answer to the paragraph amending the complainants' bill of complaint and for amendment to their answer heretofore filed herein, say:

That on July 12th, 1898, the board of public works of the city of Detroit sent to the common council the following communication:

To the honorable the common council:

GENTLEMEN: The board of public works, in recommending the paving of Second avenue from the end of the present asphalt to the boulevard, under the $200,000 clause of the charter, has in view the following facts: There exists a strong necessity for the paving of the street, because the paving now on the street ends at a dirt street; also for the reason that it is the only north and south street in that part of the city which runs directly to the boulevard, with the exception of Woodward avenue itself, with its double line of street-

car tracks, and for the reason that a great many prominent property-owners on Second avenue ask to have it paved with asphalt from the end of the present asphalt to the boulevard.

The remainder of Second avenue is now paved with asphalt, and this portion proposed to be paved will have double roadways, and the spaces between may be beautified and made into parks.

The city is about to open Second avenue north of the boulevard at great expense, and the new Central high school is already
16 located on the same street, and the board believes that the imperative necessity for this improvement will be apparent to all.

For these reasons the board recom-ends the paving of the street as indicated above.

Estimated cost, $40,000.

Respectfully submitted.

D. W. H. MORELAND.
JAMES W. MILLEN.

These defendants further say that specifications had been duly prepared by the board of public works for asphalt paving and which were duly approved by the common council long prior to the 12th day of July, 1898, and the terms thereof were well known to the common council and others having any interest therein. The said specifications were referred to in the advertisement for bids made by the board of public works, a copy of a part of which is annexed to said bill of complaint, in connection with the description of the work to be done, and bid- were solicited for performance of the work in accordance with said specifications, and a copy of the same specifications *are* annexed to the contract as part thereof which was confirmed by the common council.

These defendants further say that on the day and at the time named in said advertisement, to wit, September 6th, 1898, at ten o'clock a. m., the board of public works met and opened all bids in pursuance of said advertisement. Said meeting was held at the office of the board and the bids were opened in the presence of the bidders or their agents and such other persons as were pleased to be present at such time. The amounts respectively bid and the names of all the bidders were communicated by the board to the common council at the same time the contract was submitted to it for confirmation.

OTTO E. C. GUELICH,
ALCATRAZ ASPHALT PAVING COMPANY,
By JOHN J. SPEED, *Solicitor.*

JOHN J. SPEED,
Solicitor for Defendant- Guelich and Alcatraz Asphalt Paving Co.

17 STATE OF MICHIGAN, } ss:
County of Wayne, }

D. W. H. Moreland, being duly sworn, says that he is the president of the board of public works of the city of Detroit, and that he has read the foregoing answer, and that the same is true of his own knowledge, except as to matters alleged to be upon information and belief, and as to them he believes it to be true.

D. W. H. MORELAND.

Subscribed and sworn to before me this seventh day of October, 1898.

ROBERT Y. OGG,
Notary Public, Wayne County, Mich.

18 *Supplemental Bill of Complaint.*

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED, ET AL. }
vs. } No. 19631.
THE CITY OF DETROIT ET AL. }

Your orators, The Cass Farm Company, Limited, J. O. Harris, Bryant Walker, Jessie Radcliffe and Bryant Walker, administrator of the estate of Joseph A. Moross, deceased, complainants in the above-entitled cause, file their supplemental bill therein, in order that the proceedings taken subsequently to the filing of the original bill in the matter of the paving and grading of Second avenue between the south curb line of Colburn place and the south line of the railroad crossing, and the assessment levied against the abutting property owners for the purpose of defraying the expenses of the same, may be brought to the notice of the court, and respectfully show unto the court:

1. That the original bill of complaint was filed in this cause on the 26th day of September, 1898. That a preliminary injunction restraining the contractors and board of public works from continuing work under the contract for the said paving, was issued on the same date. That on the 30th day of September, 1898, a motion to dissolve the preliminary injunction was argued, and that on October 3rd of the same year an order was entered dissolving the said injunction.

2. That it is expressly provided by section 8 of chapter 32 of the Revised Ordinances of the City of Detroit, that after the board of assessors shall have made a list of the property in the local assessment district established by the common council, and after the said list shall be confirmed by the council, they shall proceed to the confirmation of such assessment, and upon the confirmation of such assessment-roll the city clerk shall deliver the same to the controller. That further, in section 9 of the same chapter it is provided that the

controller, upon the receipt of said assessment-roll by the last section provided, shall make the necessary entries in his books as required by the charter and ordinances, and may retain the same in his office in his discretion, until work under the contract which shall
19 have been made, is commenced. He shall at the same time, or at such time previous to the commencement of the work as he shall deem expedient, deliver such assessment-roll to the receiver of taxes, and thereafter such proceedings shall be taken thereupon as are provided in the charter and ordinances for the collection of special assessments.

3. Your orators further show that in direct contravention to the directions expressed in said sections 8 and 9, the said assessment-roll was not delivered to the controller by the city clerk, but was delivered by the board of assessors to the controller, and this not until after the work under the contract for paving had been completed. That the receiver of taxes did not, at the time at which the work was commenced, or at any time previous to the commencement of the work, receive from the controller the said assessment-roll, as expressly provided for in said section 9.

4. Your orators further show that on the 3rd day of January, 1899, the board of public works sent a report to the common council that the paving of Second avenue under the contract confirmed the 10th day of September, 1898, was fully completed from the south curb line of Colburn place to the south line of the railroads. That the pavement was of asphalt on concrete and had been examined by the board of public works and had been found to be in accordance with the contract and specifications for the same, further stating the amount due the contractor for paving said avenue; which said report was accepted, and by unanimous consent a resolution was offered that the paving within the limits above mentioned be accepted and that the controller be authorized to draw his warrant in payment of said work, and that the said controller be directed to prepare bonds to defray the expenses of the same, which said resolution was unanimously adopted by the said common council.

5. Your orators further aver that the laying of foundation and the paving of Second avenue was not in accordance with the said contract; that the said contract called for the completion of said work by the first day of November, A. D. 1898 (as required by section 33 of chapter 11 of the charter of the city of Detroit), which said work was not completed until the latter part of December in the same year. That the time for the completion of said contract was never extended by the common council; that the concrete foundation was wholly insufficient, being poorly laid, and that the work was done during the cold weather in winter, at a time when said work could not properly be completed; that the said asphalt laid on said concrete foundation is uneven, rough, and totally unfit for such pavement, and should not have been accepted by the said board of public works.

20 6. Your orators further show that the contract under which the said pavement was attempted to be laid provided that the contractor excavate a trench twelve inches wide on each side of

and beyond the line of the roadway, to the depth of twenty-four inches below the established grade. The bottom of the trench to be smoothly trimmed parallel to the curb grade, and to have laid therein a continuous line of well-burned four-inch tile, to be well connected, to the receiving basins. That this provision has been only partially and in nowise adequately carried out by the said contractor.

7. Your orators further show that on the 18th day of January, 1899, they received a notice from the receiver of taxes of the city of Detroit, notifying them of an assessment levied against them for this said pavement. That section 9 of chapter 6 of the Revised Ordinances of Detroit, provides that the receiver of taxes shall collect all special assessments imposed and levied by the common council, and after the expiration of thirty days from the time of the acceptance of the work for which each roll is made, he shall have authority, and it shall be his duty to collect the sums imposed upon every assessment-roll placed in his hands.

Wherefore your orators pray:

(1st.) That they may be granted the relief prayed for in sections 1, 2, 3 and 4 of the original bill filed in this cause.

(2nd.) That the assessment levied against them for the pavement of the said portion of Second avenue from the south curb line of Colburn place to the southerly line of the railroads be declared null and void:

(*a.*) Because the directions and provisions prescribed by the charter and revised ordinances of the city of Detroit have not been carried out.

(*b.*) Because the contract for the said paving of Second avenue has not been fulfilled.

(3rd.) That your orators may have such other or further and different relief in the premises as may be agreeable to equity and good conscience.

And your orators will ever pray.

CASS FARM COMPANY, LIMITED.
J. O. HARRIS,
BRYANT WALKER,
JESSIE RADCLIFFE,
BRYANT WALKER,
Administrator of the Estate of Joseph A. Moross, Deceased,
By RUSSEL & CAMPBELL,
Their Solicitors.

RUSSEL & CAMPBELL,
Solicitors for Complainants and of Counsel,
604 *Union Trust Building.*

21 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, Jessie W. Radcliffe, and Bryant Walker, Administrator of the Estate of Joseph A. Moross, Deceased,

vs.

CITY OF DETROIT, BOARD OF PUBLIC WORKS OF DETROIT, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and Alcatraz Asphalt Paving Co.

On filing due proof of personal service of the supplemental bill of complaint in the above-entitled cause on all of the defendants therein by giving the same to their solicitors, and it appearing by proof that said defendants have not answered, pleaded, or demurred, on motion of Russel & Campbell, solicitors for the complainant, it is—

Ordered that the supplemental bill of complaint filed in this cause be, and the same is hereby, taken as confessed by all of said defendants.

RUSSEL & CAMPBELL,
Solicitors for Complainants.

Dated June 15th, 1899.

22 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, Jessie W. Radcliffe, and Bryant Walker, Administrator of the Estate of Joseph A. Moross, Deceased,

vs.

CITY OF DETROIT, BOARD OF PUBLIC WORKS OF DETROIT, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and Alcatraz Asphalt Paving Company.

STATE OF MICHIGAN, } *ss:*
County of Wayne, }

Charles H. Campbell, being duly sworn, deposes and says that he is a member of the firm of Russel & Campbell, solicitors for the complainants in this cause; that no plea, answer, or demurrer to the supplemental bill of complaint has been served in this cause upon said Russel & Campbell by or on behalf of any of the defendants herein, and this deponent verily believes that no such plea, answer, or demurrer has been filed herein by any of said defendants.

CHARLES H. CAMPBELL.

Sworn to and subscribed before me this fifteenth day of June, 1899.

ALEXANDER HAMILTON SIBLEY,
Notary Public, Wayne County, Michigan.

23 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, Jessie W. Radcliffe, and Bryant Walker, Administrator of the Estate of Joseph A. Moross, Deceased,

vs.

CITY OF DETROIT, BOARD OF PUBLIC WORKS OF DETROIT, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and Alcatrac Asphalt Paving Company.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Alexander Hamilton Sibley, being duly sworn, deposes and says that on the 15th day of February, 1899, he served a copy of the supplemental bill of complaint filed in this cause upon C. D. Joslyn, solicitor for the City of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, and Board of Public Works, by leaving the same with Charles Flowers, and that on the same day he further served a copy of said supplemental bill upon John J. Speed, solicitor for Otto E. C. Guelich and the Alcatraz Asphalt Paving Company, by leaving the same with the clerk in charge of the office of said Speed.

ALEXANDER HAMILTON SIBLEY.

Sworn to and subscribed before me this 15th day of June, 1899.

PERCY J. FARRELL,
Notary Public, Wayne County, Michigan.

24 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED, ET AL.
vs.
CITY OF DETROIT ET AL.

To Charles D. Joslyn and John J. Speed, solicitors for defendants:

You will please take notice that the within is a true copy of an order *pro confesso* to the supplemental bill of complaint this day entered in the above-entitled cause and of the affidavit upon which the same is based.

RUSSEL & CAMPBELL,
Solicitors for Complainants.

Detroit, Mich., June 15th, 1899.

25 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, Jessie W. Radcliffe, Bryant Walker, Adm'r,
vs.
THE CITY OF DETROIT, D. W. H. MORELAND, H. KALLMAN, JAMES W. Millen.

At a session of said court, held at the court-room, in the city of Detroit, in said county, on the 18th day of January, 1900.

Present: Hon. Morse Rohnert, circuit judge.

The parties in the above-entitled cause appearing in open court, by their solicitors, and the latter agreeing thereto—

It is hereby ordered that the order *pro confesso* to the supplemental bill of complaint, hereto-entered in said cause, be, and the same is hereby, set aside as against the City of Detroit and the above-named Members of the Board of Public Works, with ten dollars costs.

____ ____,
Circuit Judge.

26 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LTD.; J. O. HARRIS, BRYANT WALKER, JESSE W. Radcliffe, Bryant Walker, Adm'r,
vs.
THE CITY OF DETROIT, D. W. H. MORELAND, H. KALLMAN, JAMES W. Millen.

The answer of the defendants, The City of Detroit, D. W. H. Moreland, H. Kallman, and James W. Millen, to complainants' supplemental bill of complaint.

1. These defendants admit the allegations contained in paragraphs 1 and 2 of said supplemental bill of complaint, but deny that they are in any way material to the issue in said cause.

2. These defendants admit the allegations contained in paragraphs 4 and 7 of said supplemental bill of complaint.

3. These defendants deny the allegations contained in paragraphs 3, 5 and 6 of said supplemental bill of complaint.

4. These defendants claim the benefit of a demurrer to paragraphs 3, 5 and 6 of said supplemental bill of complaint, the same as if they had been herein specially demurred to.

THE CITY OF DETROIT,
By CHAS. FLOWERS,
Corporation Counsel.
D. W. H. MORELAND,
H. KALLMAN,
JAMES M. MILLEN,
By CHAS. FLOWERS,
Corporation Counsel.

CHAS. FLOWERS,
Solicitor for said Defendants.
Detroit, January 17th, 1900.

27 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED, ET AL.
vs.
CITY OF DETROIT ET AL.
} No. 19631. Amendment to Bill of Complaint.

Now come the complainants and amend their bill of complaint heretofore filed in said cause by adding thereto the following paragraph:

14. Your orators further aver that the provisions of the charter of the city of Detroit and the paving ordinances of said city, in so far as the same provide for an assessment of the cost of paving upon the abutting property in proportion to the frontage of such property, are in violation of the Constitution of the United States and the amendments thereof, and therefore null and void.

RUSSEL & CAMPBELL,
Solicitors for Complainants.

Business address: 604 Union Trust building, Detroit, Michigan.

28 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM CO., LIMITED, ET AL.
vs.
CITY OF DETROIT ET AL.

It is hereby stipulated by and between the parties to the above-entitled cause, by their respective solicitors, that William Craig, Alice C. Hutton, James Craig, Jr., and Helen C. Fry, who claim to own property upon Second avenue which is subject to the assessment sought to be set aside by the complainants in this cause, be joined as parties complainant in the proceedings in the above-entitled cause as they at present stand.

Dated March —, 1899.

JOHN J. SPEED,
Solicitor for Otto E. C. Guelich and the Alcatraz Asphalt Paving Company.
CHAS. FLOWERS,
Solicitor for City of Detroit.

29 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY (LIMITED) ET AL., Complainants,
vs.
THE CITY OF DETROIT ET AL., Defendants.

By MORSE ROHNERT, *Circuit Judge:*

In this matter in the original bill relief was asked for against the paving of Second street from Colburne place to the railroad cross-

ing, as ordered by the common council of the city of Detroit, and in the supplemental bill filed relief was asked from payment of the assessment made against complainants for the paving of said street.

A number of objections were made to the proceedings taken to bring about the pavement, and eventually resulting in the pavement and the assessment for the same.

One objection to the pavement was made to the condition of the pavement as laid. I fail to be convinced from the testimony that the present condition of the asphalt pavement on said street differs much from the condition of other asphalt pavements laid, and I am not convinced that it is not a satisfactory pavement.

Of the other objections made I shall consider but the one, as I think that that objection alone entitles the complainants to the relief prayed for.

30 The objection is this, that the board of public works in advertising for proposals for the said pavement had failed in said advertisement to specify the time and place the bids would be opened, as required by the provisions of the ordinances of the city of Detroit. These provisions are clear and distinct, and were made for the purpose of avoiding juggling with bids, and I consider them equally binding upon the board of public works and upon the common council of the city of Detroit, the common council being, under the charter, required to give their final approval to the contract for the pavement.

The question here is whether these provisions are directory or mandatory. If this court hold the same directory it would leave it optional with the board of public works to specify the time and place of opening of the bids in advertising for bids. This would permit a condition of things which the ordinance intended to avoid, and, to my mind, a condition of things which should be avoided. I cannot therefore place such a construction upon the requirements of the ordinance which would leave it in the power of the board of public works to open bids at such time and place as they saw fit, without the knowledge of the people who are interested in the pavement and who must be called upon to pay for the same.

The purpose of the requirements of the ordinance are so important that they must be considered mandatory. Being mandatory, any proceedings taken subsequent to the resolution of the common council directing that said improvements shall be undertaken, and commencing with the advertising for proposals for doing the work incident to said improvements, are without force and effect.

I therefore grant the relief prayed for in the supplemental bill, and make the injunction restraining the collection of any assessment for said work permanent.

31 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne. In Chancery.

CASS FARM COMPANY, LIMITED, ET AL.
vs.
THE CITY OF DETROIT ET AL.

This cause coming on for hearing upon pleadings and proofs, evidence was given on the part of the complainants tending to show that after the making of the contract set up in the bill of complaint a copy of which is hereto attached, the work of paving Second avenue was nominally begun under the contract, September 28th, 1898. The distance to be paved between Colburn avenue and the railroad track was about half a mile. Up to the first day of November the only work which had been done upon the street was the concreting of about two blocks upon one side of the street. The remainder of the concreting was finished and all of the asphalt work done after the 1st day of November, the work being completed and accepted January 3rd, 1899. During the time when this work was done the weather was generally cold, the temperature each day from November 1st to January 3rd, 1899, being shown by the table hereto attached, the report of the United States Weather Bureau. During a part of the time the weather was so cold that the work had to be suspended, and at times was carried on during only a few hours of each day when the weather became sufficiently warm to permit the laying of the concrete.

The effect of cold weather upon concrete is to prevent its setting properly, and the effect of laying asphalt in cold weather is that if it happens to get chilled it forms in lumps and is harder to work. The pavement, when finished, was wavy and irregular, so that water stood in places upon it after heavy rains; and it was cracked in many places.

No authority was obtained from the common council extending the time for completing the pavement after the 1st of November, and the board of public works did not exact from the contractor the penalty of twenty-five dollars per day provided for in the contract and specifications under which the pavement was laid.

The territory included in the contract is all vacant property, upon both sides of the street, with the exception of three houses built along the street. About the time the pavement was completed and before an assessment was spread the complainant served in addition to the notices shown in the bill of complaint, a notice, a copy of which is hereto attached, marked Exhibit "C."

32 The city clerk received the assessment-roll for said paving from the board of assessors on January 3rd, 1899; and probably on that same day it was delivered to the controller, and was delivered by him to the receiver of taxes on January 11th, 1899.

Evidence was given on the part of the defendant tending to show that no concrete was laid when the weather was below freezing, and that the asphalt and concrete were properly laid. That the effect of cold weather upon the work of laying asphalt was to make it harder

work and more expensive to lay it. Also evidence tending to show that the work was finished as called for by the specifications and in accordance therewith.

Also testimony of Robert Y. Ogg, secretary of the board of public works, tending to show that the bids or proposals for paving Second avenue were opened in the office of the board of public works at ten o'clock a. m., local time, on September 5th, 1898, in public, and in the presence of those who had tendered bids, that being the time mentioned as the hour up to which bids would be received. It had always been the custom of the board to open the bids at the hour named; as a rule every man who puts in a bid is present at the opening.

This was corroborated by D. W. H. Moreland, who was at the time of opening the bids relating to the Second Avenue paving a member of the board.

John McVicar was connected with the board as secretary and commissioner from September, 1890, until February, 1898; he also testified to the custom of the board, which was that the hour named as the limit when bids were received was always treated by the board as the hour for opening bids; and that the contractors and builders knew of such custom, and it was their custom to be present at such time. That occasionally, when a commissioner was late, or for some other reason, a motion would sometimes be made to postpone the opening for a few minutes. Whenever this was done it was done publicly and the people present were notified when the bids would be opened.

The foregoing is hereby certified to be substantially the testimony taken on the hearing of said cause. This certificate is made in pursuance of the statute to enable the defendants to appeal from the decree herein.

Dated at Detroit, Mich., this 3rd day of March, 1900.

MORSE ROHNERT,
Circuit Judge.

33 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne. In Chancery.

THE CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT Walker, Jesse W. Radcliffe, and Bryant Walker, Administrator of the Estate of Joseph A. Moross, Deceased; William Craig, Alice C. Hutton, James Craig, Jr., Helen C. Fry, and S. A. Buchanan, Complainants,

vs.

THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Asphalt Paving Company, Defendants.

At a session of said court, held at court-room No. 5, in the city of Detroit, in said county, on the 2nd day of March, A. D. 1900.

Present: Hon. Morse Rohnert, circuit judge.

This cause having come on to be heard, upon the bill of complaint, and proofs taken in open court, and having been argued by counsel for respective parties, and the court having duly considered the same, it is ordered, adjudged and decreed:

First. That the contract described in said bill of complaint, made between the City of Detroit and the Board of Public Works, on the one part, and the Alcatraz Asphalt Paving Company, on the other, is null and void, and it is hereby set aside and cancelled, and that all proceedings had thereunder are of no effect, and that the defendants The City of Detroit and The Board of Public Works be, and are hereby perpetually enjoined from acting under or enforcing the same.

Second. That the assessment set forth in said supplemental bill of complaint levied against the complainants is hereby declared null and void, and that the defendant The City of Detroit be perpetually enjoined from attempting to collect the same.

Third. That the defendants pay to the complainants their costs to be taxed, and that an execution be issued therefor.

MORSE ROHNERT,
Circuit Judge.

34 EXHIBIT "B."

United States Weather Bureau—Record of Maximum and Minimum Temperature at Detroit, Mich., from—

Date.	November, 1898.		December, 1898.		January, 1899.	
	Max.	Min.	Max.	Min.	Max.	Min.
1	52	38	33	25	17	9
2	53	42	36	32	30	14
3	55	38	42	31	41	24
4	64	46	36	30	50	33
5	60	42	34	26	33	18
6	42	34	30	22		
7	48	32	25	16		
8	52	43	22	10		
9	43	33	26	16		
10	38	32	21	14		
11	35	27	30	18		
12	40	27	30	19		
13	40	34	20	10		
14	40	33	16	4		
15	40	33	24	11		
16	41	30	36	20		
17	49	35	35	29		
18	54	43	38	25		
19	49	39	37	21		
20	45	36	40	34		
21	63	41	36	34		
22	59	18	43	34		
23	23	14	36	31		

Date.	November, 1898. Max.	Min.	December, 1898. Max.	Min.	January, 1899. Max.	Min.
24	25	18	31	25		
25	29	17	29	24		
26	33	26	31	24		
27	33	21	33	14		
28	33	16	28	12		
29	34	29	49	28		
30	33	25	47	20		
31	...	...	20	14		

Certified copy.

NORMAN B. CONGER,
Inspector Weather Bureau.

35 EXHIBIT "C."

Cass Farm Co., Limited, 604 Union Trust building.

DETROIT, MICH., *Dec.* 29, 1898.

To the Board of Public Works, Detroit, Michigan.

GENTLEMEN: We desire to call your attention to the character of the asphalt paving which is being put down upon Second avenue between Colburn place and the railroad crossing. The concrete in many places has been put down in cold weather, has frozen and disintegrated, and the asphalt has been put down under similar circumstances. In many instances the asphalt has been put down when the concrete was not set, and frequently the wagons hauling the asphalt would sink into the concrete when they were passing over it.

As substantially all of this work has been done after the time limited in the charter for doing paving, it seems to us that the consequence of such poor work should not fall upon the property-owners.

You are probably aware that we have already filed a bill against the city to enjoin this paving job, and one of the points made in that bill was that it was impossible to complete the work within the time prescribed by the charter. We now call your attention to the matter again, and wish to record our protest, not only against the work, but against the character of the work which is being done.

Yours truly,
(H. M. C.)

CASS FARM CO., LTD.
H. M. CAMPBELL, *Treas.*

36 EXHIBIT "D."

City engineer's office.

Asphalt on concrete; two roadways, each 30 feet wide.

DETROIT, *August* 31*st*, 1898.

Quantities for grading, paving, etc., Second avenue from the south curb line of Colburn place to the south line of the railroad, exclusive of the quantities within the lines of the cross-streets and alleys.

Quantities.	Description of work.	Dolls.	Cts.
4,669	Cubic yards of excavation.....		
6,046.25	Lineal feet of circular curbstone (new), straight..		
471.20	Lineal feet of curbstone in 10.15 R. Medina, furnished by contractor.....		
75	Lineal feet of retaining stone (old Medina curb may be used), set in concrete 6 inches deep, 8 inches wide.....		
10,728.12	Square yards asphalt on concrete.....		
	Square yards of concrete.....		
	Cubic yards of concrete under and behind curb.		
	At the junction of pavement with car track the contractor will fill void under rail heads with cement mortar without extra charge.		
	Proportion of cost of advertising and blanks to be paid by tax.....	$29	00
	Proportion of inspector's compensation to be paid by tax	429	00

For the city.

The quantities within the lines of intersections of the cross-streets and alleys and the cross-walks within such intersections.

Quantities.	Description.	Dolls.	Cts.
1,477	Cubic yards of excavation.....		
	Cubic yards of excavation, including old paving material		
	Lineal feet of new curbstone (straight).....		
326.56	Lineal feet of new curbstone in 20.10, 2.4 R. Medina circles, furnished by contractor.....		
	Lineal feet of curbstone in (—) circles, furnished by city, set by contractor.....		
	Lineal feet of curbstone reset.....		
3,729.60	Square yards of asphalt on concrete paving.....		
	Square yards of — paving.....		
	Square yards of concrete under paving.....		
	Cubic yards of concrete under and behind curb.		

37

450.50 Lineal feet of retaining stone, old Medina curb may be used, set in concrete 6 inches deep and 8 inches wide.....
Lineal feet of retaining plank .....

At the junction of pavement with car-track the contractor will fill void under rail heads with cement mortar without extra charge.

City's proportion of cost of advertising and blanks..... $11 00
City's proportion of inspector's compensation... 149 00

I certify that the above quantities and estimates are correct.

H. D. LUDDEN,
City Engineer.

Know all men by these presents that we, The Alcatraz Construction Co., of New York City, and The American Bonding & Trust Co., of Baltimore City, are held and firmly bound unto the City of Detroit in the sum of nine thousand three hundred and twenty-seven dollars and seventy-four cents ($9,327.74), lawful money of the United States of America, to be paid to the City of Detroit, or their attorneys, successors or assigns, for which payment, well and truly made, we and each of us do jointly and severally bind ourselves and each of our heirs, executors and administrators, firmly by these presents.

Whereas, the above-bounden Alcatraz Construction Co., in an instrument in writing under their hand and seal, dated this ninth day of September, 1898, contract with the City of Detroit to furnish all material and labor, excavate for, build, construct, and in all respects complete, according to specifications thereto annexed in paving with asphalt Second avenue, first section, Detroit, Michigan.

Whereas, in the specifications forming a part of this contract it was agreed by the said Alcatraz Construction Co. that it should give to the City of Detroit a written warrantee and guarantee for the durability of the work and pavement for ten years from the completion of the same. Covenanting and agreeing therein to make and keep the pavement, its entire width and length, in good order and repair during said ten years without any expense to the City of Detroit or taxpayers of the street for the same; and as a security for the faith-

38 ful performance of and fulfilling these specifications and contract, and the carrying out of the spirit and letter of said warrantee, the contractor shall give to the City of Detroit a good and approved bond for a sum not less than nine thousand three hundred and twenty-seven dollars and seventy-four cents ($9,327.74), binding themselves, their heirs, executors and administrators, faithfully to the performance and completion of the same.

Now, therefore, in consideration of these presents, the said bounden Alcatraz Construction Co. does hereby covenant and agree to and with the said City of Detroit that the said pavement shall be durable for the period of ten years from the date hereof, and that it will

keep the same, its entire length and width, in good order and repair during the said ten years without any expense to the City of Detroit or tax-payers of said streets, and the condition of this obligation is such that if the said Alcatraz Construction Co., or its executors, or administrators, shall well and truly keep the said pavement, its entire length and width, in good order and repair during the said ten years next ensuing without expense to the City of Detroit or tax-payers of the street for the same, otherwise to remain in full force and virtue.

(Signed) ALCATRAZ CONSTRUCTION CO.,
By OTTO E. C. GUELICH, *Attorney-in-fact.*
AMERICAN BONDING & TRUST CO.,
[SEAL.] By JOHN E. ROBIE, *Vice-Pres't.*

Attest: AUSTIN H. HART,
Ass't Secretary.

[Revenue stamps, fifty cents.]

STATE OF NEW YORK,)
County of Erie, City of Buffalo,) *ss:*

ON this ninth day of September, 1898, before me personally appeared Austin H. Hart, to me known, who, by me being duly sworn, deposes and says that he resides in the city of Buffalo, N. Y.; that he is the assistant secretary of the American Bonding & Trust Company; that he knows the corporate seal of the company; that the seal affixed to this instrument is such corporate seal; that it was affixed by order of the board of trustees of such company, and that he signed the same by like order as assistant secretary of said company; and he further says that he also knows John E. Robie, the vice-president of the company, and that the signature of the said John E. Robie is in the handwriting of the said vice-president, and was thereto subscribed in the presence of the said assistant secretary by like order of the board of trustees.

(Signed) MAX G. COHEN,
[SEAL.] *Notary Public, Erie Co., N. Y.*

39 Know all men by these presents that we, The Alcatraz Construction Company, of New York City, as principal, and The American Bonding & Trust Company, of Baltimore City, as sureties, are held and firmly bound unto the City of Detroit in the sum of nine thousand three hundred and twenty-seven dollars and seventy-four cents ($9,327.74), lawful money of the United States of America, to be paid to the said City of Detroit, its successors or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated the ninth day of September, one thousand eight hundred and ninety-eight.

Whereas, the above-bounden Alcatraz Construction Company, by an instrument in writing under its hand and seal, bearing even

date with these presents, contracts with the City of Detroit to furnish all material and labor, excavate for, build, construct and in all respects complete, on or before the thirty-first day of October, 1898, in the manner, on the conditions and for the consideration in the annexed and preceding contracts mentioned and contained for the paving with asphalt Second avenue, 1st section, Detroit, Michigan.

Now, therefore, the conditions of the above obligations are such that if the above-bounden Alcatraz Construction Co. shall well and truly and in good and sufficient workmanlike manner perform the work mentioned in the aforesaid agreement in accordance with the terms and conditions therein stipulated, and in each and every respect comply with the conditions therein contained, and shall well and truly pay, or cause to be paid, in full, the wages stipulated and agreed to be paid to each and every person employed by it to perform any labor services by the said Alcatraz Construction Co. above named, or its agent or agents, in the doing of the work above mentioned as specified in the agreement or contract between the Alcatraz Construction Company and the City of Detroit, hereunto annexed, during the process of said work, and shall pay when the same shall become due, the price of all material provided or used in the performance of said work, and shall in all things faithfully perform on its part the terms and conditions of said contract or agreement, then this obligation shall cease, otherwise to be and remain in full force and virtue. And in case the above-bounden Alcatraz Construction Company shall fail to fully complete the said work on or before the 31st day of October, 1898, then and
40 in that case we do further undertake and become bounded to pay to the City of Detroit the sum of nine thousand, three hundred and twenty-seven dollars and seventy-four cents ($9,327.74) as stipulated damages, and not as a penalty. And in case the said Alcatraz Construction Company shall fail to pay to each and every of the persons employed to perform labor or services aforesaid, or to whom anything shall be due for material provided or used in the performance of said work, as hereinabove provided, then each and every of said persons to whom the aforesaid Alcatraz Construction Company shall be then indebted may bring an action on this instrument in his or her name for the recovery of the amount of such indebtedness in the same manner as if such person was a party named in this instrument.

(Signed) ALCATRAZ CONSTRUCTION CO.,
[SEAL.] By OTTO E. C. GUELICH, *Attorney-in-fact.*
THE AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY,
By JOHN E. ROBIE, *Vice-Pres't.*

Attest: AUSTIN H. HART,
Assistant Secretary.

STATE OF NEW YORK, } ss:
County of Erie, City of Buffalo, }

On this ninth day of September, 1898, before me personally appeared Austin H. Hart, to me known, who, by me being duly sworn, deposes and says that he resides in the city of Buffalo, N. Y.; that he is the assistant secretary of the American Bonding & Trust Co.; that he knows the corporate seal of the company; that the seal affixed to this instrument is such corporate seal; that it was affixed by order of the board of trustees of such company, and that he signed the same by like order as assistant secretary of said company. And he further says that he also knows John E. Robie, the vice-president of the company, and that the signature of the said John E. Robie is in the genuine handwriting of the said vice-president, and was thereto subscribed in the presence of the said assistant secretary by like order of the board of trustees.

(Signed) MAX G. COHEN,
[SEAL.] *Notary Public.*

41 To the Board of Public Works:

We, the undersigned, offer to execute and perform the work specified in the advertisement hereunto attached according to the specifications adopted by the common council, at the following prices, to wit:

	Quantities.	Rate.	Total cost—curb.	Total cost—curb.
Excavating and removing earth or other material, per cubic yard	4,669	.10	$466.90	
Medina curbstone, per lineal foot	6,046.25	.45	2,720.81	
Curbstone, per lineal foot, circles	471.20	.81	376.96	
North River blue, per lineal foot				
Retaining stone	75	.10	7.50	
Granite, per lineal foot				
Paving, cedar blocks on concrete, per square yard				
" brick on concrete, per square yard				
" asphalt on concrete, per square yard	10,728.12	1.55	16,628.59	
" Thousand Islands granite block, per square yard				
" Medina stone on concrete, per square yard				
" cobblestone, per square yard				
Concreting under and behind curb, per cubic yard				
Assessment total			$20,200.76	

Paving, etc., City of Detroit.

Excavating and removing earth or other material, per cubic yard				
Medina curbstone, per lineal foot				
Elyria curbstone, per lineal foot				
North River blue, per lineal foot				
Woolmith, per lineal foot				
Granite, per lineal foot				
Curbstone, circular, per lineal foot				
Curbstone, reset, per lineal foot				
Paving, cedar blocks on concrete, per square yard				
" brick on concrete, per square yard				
" asphalt on concrete per square yard	3,729.60	1.55	5,780.88	
" Thousand Islands granite block, per square yard				
" Medina stone on concrete, per square yard				
" cobblestone, per square yard				
Concrete under paving, per square yard				

The above proposals include ballast, gravel, top dressing and laying and finishing complete the pavement, curbstone and crosswalks, as required by the specifications adopted by the common council, the estimates of the city engineer on file in the board of public works office, and the advertisement hereunto attached.

ALCATRAZ CONSTRUCTION CO.,
By OTTO E. C. GUELICH,
Attorney-in-fact. } *Bidders.*

Instructions to Bidders for Paving Streets.

All parties desiring to submit proposals for paving streets with any patent pavement shall, before such proposals are opened, file with the board of public works a certified copy of the letters patent under which their proposals are made, and the authority under which they propose to use such patent pavement on the streets of the city, or file a bond to indemnify the city against all claims of royalty.

(See council proceedings, May 17, 1892.)

Bidders will be required to file a certified — with the board of public works, before the proposals are opened, conditioned that, should they be found to be the lowest bidders and the common council accept their bid, they will enter into a contract within ten days, with good and sufficient sureties to perform the work.

Bids must be endorsed with the names of the parties bidding, the name of the street and the kind of pavement.

In no case will proposals be considered, unless the above requirements are fully complied with.

Blanks and all necessary information will be furnished by the board of public works.

42 *Specifications for Asphalt Sheet Pavement in the City of Detroit, Mich., under the Board of Public Works. Adopted February 24, 1892.*

The old —— pavement to be taken up, and all material and rubbish, including whatever surface dirt may be on the street at the time, shall be removed from the street and disposed of by the contractor, except that the city will reserve such of the best of the material as the board of public works may select and remove from the street after having been taken up by the contractor.

The street to be graded to its established grade, under the direction of the board of public works, and to be excavated to such a depth below the true grade as the board may deem necessary for the purpose of receiving ballast for the roadway. The bottom of excavation when completed shall conform to the section or crown of the street as furnished by the city engineer. If there are places in the street which are not firm or properly settled, caused by trenching or connection of sewers, gas or water pipes, the earth must be taken out and the space refilled with broken stone or coarse gravel, and pounded to make it solid. In all cases where any filling may

be necessary to bring the bed to the required height, it shall be done in layers not to exceed six (6) inches in depth, and be thoroughly tamped or rolled to insure a solid bed. None of the earth excavated shall be piled upon the sides of the street, unless required for filling a low spot at the point where left.

If the contractor shall excavate deeper than the depths shown on the diagram, the depressions shall be filled with broken stone or gravel.

Before placing the ballast or concrete thereon, the subgrade in each block shall be well rolled with a steam roller weighing not less than seven (7) tons; if the contractor does not himself own such a roller, the same to be furnished and operated by the city of Detroit at a cost to the contractor of one cent per square yard. The surplus earth, if any, must be disposed of by the contractor, the said board reserving the right to direct the contractor to remove any earth it may require for the purpose of filling up any low lots, alleys, and sidewalks to the proper grade within the assessment district, or for six hundred (600) feet outside thereof.

43 The contractor will excavate a trench twelve (12) inches wide on each side of and beyond the line of the roadway to the depth of twenty-four (24) inches below the established grade.

The bottom of the trench to be smoothly trimmed parallel to the curb grade, and have laid therein a continuous line of well-burned four (4) inch tile, to be well connected, to the receiving basins. Joints are to be well covered with tar paper and the tile covered with broken stone or gravel.

When the road-bed has been prepared as specified above, it will be covered by a layer of concrete six (6) inches in thickness and prepared in the following manner: The component parts of the concrete will be: One (1) part of freshly burned and finely ground American cement standing the following tests made by the city engineer: No more than ten (10) per cent. will fail to pass through a sieve of twenty-five hundred meshes to the square inch; when mixed neat with the least amount of water necessary to make a good mortar, it will sustain a tensile strain of not less than sixty (60) pounds per square inch, after being allowed to set in air for one (1) hour, and followed by an immersion in water for twenty-four (24) hours; two (2) parts of clean, sharp lake or river sand, free from clay, loam or vegetable matter; five (5) parts of crushed or broken boulders, granite, syenite, paving brick or hard limestone, or clean screened bank gravel, the piece not to be larger than two (2) inches or smaller than one-half ($\frac{1}{2}$) inch in any dimension. The sand and cement will be thoroughly mixed while dry, and then just enough water will be added during the mixing process to make a good mortar. The crushed or broken stone must be screened if necessary to free it from dust, dirt or stone refuse. After being wet with clean water, the crushed or broken stone shall be thoroughly mixed on boards with the cement mortar until every piece of stone is completely enveloped by mortar. The proportions will be fixed by actual measurement. This concrete will be immediately applied to the road-bed, and rammed until the surplus cement mortar appears

upon the surface, which latter will be made parallel to the road-bed and in exact accordance with the diagram. No walking or driving will be allowed on the concrete until it is thoroughly set. All defects in this foundation, no matter from what cause, must be repaired or corrected before the work will be allowed to progress.

44 Curbing now set upon the streets to be taken up, rejointed and reset to the proper line and grade wherever directed. New curbing to be set wherever ordered, and must be of the best quality of Medina, Hammond, Berlin Heights or Berea stone, and to be of the following dimensions: Medina, four (4) inches thick and not less than four (4) feet long; Hammond, four (4) inches thick and not less than four (4) feet long; Berlin Heights, four (4) inches thick and not less than four (4) feet long; Berea, four (4) inches thick and not less than four (4) feet long; all to be eighteen (18) inches deep; stones to be flat-tool or crandle dressed, true and smooth, with close joints at the ends at least fifteen (15) inches below the top of the curb and shall have a straight and even face on the side toward the gutter to the same depth as end joints; top to be dressed to a straight line, and to a ¼-inch bevel in five (5) inches, and to a uniform thickness of four inches, and brought to a straight line on top and face by the use of a straight-edge. Stones to be taken out of wind, and to be cut with a ¾-inch flat tool-draught on upper edge of face, stones to be set with close joints to the true line and grade of the street, and settled into place with a paver's rammer, and the sand, in front and rear, tamped with a heavy hand-tamper to the full depth of the stones. Curbing to be jointed and set as directed around curves and corners at same price as for straight work. All junctions at street corners will be set as a true segment of a circle of four (4) feet radius, in one piece, except Medina stone, which may be set in two (2) equal segments. The curb to be set in a bed of properly compacted, sharp, clean, river, or bank sand, and backed up with the same material to the full depth which may be in two (2) equal segments. The curb to be set in a bed of properly *contractor* — a distance of three (3) feet from the curb, where the top of the same is above the natural surface, and all to be left in a neat and sightly condition.

Upon this base will be laid the wearing surface or pavement proper, the binding material of which is a cement, prepared with any asphaltum; which must not be inferior in quality to that made

45 by refining the best quality of crude asphaltum obtained from the pitch lake of the island of Trinidad, and must be refined, and as far as possible freed from foreign organic and animal matter and volatile oil, and should contain at least sixty (60) per cent. of bituminous matter soluble in bisulphide of carbon. The wearing surface will be composed of:

Asphaltic cement	from 12 to 16	per cent.
Sand	from 73 to 67	per cent.
Pulverized carbonate of lime	from 15 to 17	per cent.
	100	100

These proportions will be varied according to circumstances, as may be necessary to secure the best practical result.

The carbonate of lime may be reduced or omitted entirely when suitable sand can be obtained.

In order to make the pavement uniform the proportion of asphaltic cement must be varied according to the quality and character of the sand.

The sand and asphaltic cement are to be heated separately to about 300 degrees Fah. The pulverized carbonate of lime, while cold, is to be mixed with hot sand in the required proportions, and then mixed with the asphaltic cement at the required temperature and in the proper proportion, in an apparatus suited to effect a perfect mixture.

The pavement mixture thus prepared will be laid on the concrete base in two coats. The first, called the cushion coat, will contain from two to four per centum more asphaltic cement than is given above; it will be laid to such a depth as will give a thickness of half an inch after being consolidated by a roller. The second, called the surface coat, prepared as above specified, will be laid on the cushion coat; it will be brought to the ground in carts, at a temperature of about 250 degrees Fah.; it will be carefully spread by means of iron rakes, in such a manner as to give a uniform and regular grade, and to such a depth that, after having received its ultimate compression, it will have a thickness of two inches. The surface will then be compressed by a hand roller; after which a small amount of hydraulic cement will be swept over it, and will be thoroughly compressed by a steam roller; the rolling being continued as long as it makes an impression on the surface. No teaming shall be permitted over the pavement until the street is opened for travel by the contractor or board of public works.

46 A sample of the asphalt paving cement, one pound in weight, proposed to be used on the paving, shall be furnished. The sample to be labeled with the bidder's name and address, and deposited in the office of the board of public works on or before the first day of May in each year.

There shall be set at the edge of the asphalt pavement where it crosses any intersecting street or alley a line of retaining stone of the same quality as the curbstone. The stones shall be four (4) inches thick, not less than eighteen (18) inches deep, and not less than three (3) feet long, and conform to the surface of the pavement with their exposed edge.

When street or other railroad tracks run through or across streets to be paved with asphalt, a marginal line of Medina or Hammond stone-paving blocks, placed as alternate headers and stretchers, shall be set, before the asphalt is laid, against the line of rails wherever the asphalt would otherwise be in contact with them.

Whenever the contractor is not present on the work, orders will be given to the superintendents or overseers who may have immediate charge thereof, and shall by them be received and strictly obeyed. And if any person employed on the work shall refuse or neglect to obey the directions of the board of public works, or its

duly authorized agents, in anything relating to the work, or as shall appear to the said board to be incompetent, disorderly or unfaithful, he shall, upon the order of the board of public works, be at once discharged and not again employed on any part of the work.

All settlement, defects or damages, in any portion of the pavement, by public travel, rain, snow, ice, frost or other causes, before the final acceptance of the work by the city, shall be repaired and made good at the contractor's expense. All rubbish which may accumulate during and by reason of the work herein provided for shall be removed by the contractor as fast as the pavement is laid, and the street left clean and in good condition.

47 Material delivered on the street, either before or after dressing, to be neatly and compactly corded up along the sides of roadway, in such a manner as to cause the least inconvenience to property-owners and to the general public. Private drives and street crossings to be kept open. Shade trees, and other improvements shall be protected by the contractor from all damage by stone or otherwise.

Travel upon the street, or upon any intersecting street or alley, shall not be hindered or inconvenienced needlessly, nor shall any portion of the roadway or street be opened up, nor shall the same be wholly obstructed without the direction of the board of public works, in which latter case the contractor shall cause plain and properly worded signs, "Street closed," announcing such fact, to be placed with proper barricades, at the nearest cross-street, upon each side of such obstructed portion, and upon intersecting streets, where travel can pass around the same in the shortest and easiest way.

Colored lights, and, if required, night watchmen are to be maintained, at the expense of the contractor, when necessary, to prevent accident.

The city reserves the right to lay or relay any and all necessary gas, water or sewer pipes during the progress of the work, or to build or rebuild any catch-basins, sewers, cisterns, or street railroad tracks.

The contractor will furnish a ten-year guarantee for his work, without extra charge. The guarantee to be of such form and nature as the board of public works may direct.

If at any time during the continuance of said guarantee the pavement should be open for the purpose of putting in the street sewers, gas pipe or water mains, or repairing the same, or for any other purpose, the contractor shall relay said pavement at a cost of ten (10) per centum above the original price, and when said pavement is relaid and restored, said guarantee shall extend to the pavement so relaid and restored for the balance of the time for which said guarantee is to continue, and in no case where it shall become necessary to disturb said pavement for any of the purposes above mentioned shall it be deemed as releasing said contractor from said guarantee.

48 The work shall at all times be subject to inspection by the city, as the work progresses, but such inspection shall not re-

lieve the contractor from any obligation to perform said work strictly in accordance with these specifications, and the work not so constructed shall be removed and made good by the contractor, whenever so ordered, without reference to any previous oversight in inspection.

The first party shall not assign or transfer this contract or sublet any of the work embraced in it, without the consent in writing of the board of public works being first obtained.

The work embraced in this contract shall be begun within one week after written notice so to do shall have been given to the contractor by the board of public works, and carried on regularly and uninterruptedly thereafter (unless the said board shall otherwise, in writing specially direct), with such a force as to insure its full completion within the time specified in the contract; the time of beginning, rate of progress, and time of completion being essential conditions of this contract. And if the contractor shall fail to complete the work by the time specified in the contract, the sum of twenty-five dollars per day for each and every day thereafter, until such completion, shall be paid to the city of Detroit through the board of public works before acceptance of the work.

The contractor, for himself or for any subcontractor under him, shall well and truly pay, as the same may become due and payable, all indebtedness which may become due to any person, firm or corporation on account of any labor or material furnished in connection with the contract of which these specifications form a part; and in case of his failure so to do, and on written notice of any unpaid claim for labor or material as above being filed with the board of public works, a sum of money sufficient to cover such a claim or claims shall be retained from any moneys due or to become due said contractor on his contract, and if such claim or claims be fully substantiated to the satisfaction of the board of public works, said board shall pay such claim or claims from the moneys so retained, any residue to be paid to such contractor on the completion of the work.

The city reserves the right to accept or reject any or all proposals made under these specifications at any time within thirty (30) days after the same are received.

Detroit, Sept. 9th, 1898.

49 Board of Public Works, City of Detroit.

Paving Contract.

This agreement, made and concluded this ninth day of Sept., one thousand eight hundred and ninety-eight, by and between the City of Detroit, by the Board of Public Works in that behalf, duly authorized by the common council of said city, party of the first part, and Alcatraz Construction Co., of the City of Detroit, contractor, party of second part.

Witnesseth, that the said party of the second part has agreed, and by these presents does agree with the said party of the first part, for

the consideration hereinafter mentioned and contained, and under the penalty of a bond bearing even date with these presents, and hereunto annexed, to furnish at its own proper cost and expense, all the labor and materials, and grade, pave, etc., etc., Second avenue from the south curb line of Colburn place to the south line of the railroads, with Alcatraz sheet asphalt on concrete foundation, two roadways, each 30 feet wide, with Medina curb, said curb to be cut in Detroit, Mich. Pavement in conformity with the specifications and estimates hereto attached and made part of this contract, and the grades and cross-sections of said work, now on file in the Board of Public Works office, according to all the conditions herein named, and to the acceptance of the said party of the first part.

And the said party of the second part further agrees to keep and maintain the said pavement in good condition and repair for ten (10) years from and after the date of the acceptance of said pavement by the Board of Public Works, so that neither the city nor the property-owners on said avenue shall be at any expense, whatever, for repairs upon said avenue, and that said pavement shall at the expiration of said ten (10) years be in good condition and repair; and that all repairs necessary shall be made within a reasonable time after notice from the Board of Public Works to make the same, and shall be thoroughly made to the satisfaction of said board at any time during the continuance of this guarantee period, up to and including the last day thereof; and should the contractor fail to make necessary repairs during the guaranteed period within 10 days after notice being given him by the Board of Public Works, the city (through said board) is hereby authorized to make the same, or cause the same to be made, and the contractor and his bondsmen shall be severally and jointly liable for the cost of the same, including supervision and all other expenses in connection; and neither the acceptance of said pavement, nor the payment thereof shall be deemed a waiver of the terms and conditions of this provision, nor a release from the obligations hereby entered into.

50 Provided, however, that if at any time during the said period of ten (10) years the pavement shall be opened for the purpose of putting in the street sewers, gas pipe or water mains, or repairing the same, or for any other purpose, the said party of the second part shall relay said pavement at a cost of ten (10) per centum above the original price, and when said pavement is relaid and restored, the terms and conditions hereof shall extend to the pavement so relaid and restored for the balance of the said period of ten (10) years then remaining, and in no case where it shall become necessary to disturb said pavement for any of the purposes above mentioned, shall it be deemed as releasing the said party of the second part from any of the terms and considerations hereof.

This contract is subject to confirmation by the common council.

The party of the second part hereby agrees and assents to the provisions and requirements of "an ordinance to prescribe the number of hours which shall constitute a day's work, etc.," passed by the common council of the city of Detroit, April 7th, 1891, as follows:

SECTION 1. That hereafter eight hours shall constitute a day's work for all laborers, workmen and mechanics who may be employed by, or in behalf of the City of Detroit, or any of its authorized boards or officers, or who may be employed by contractors and subcontractors in work done or executed under contracts with the said City of Detroit or its various authorized boards or officers.

SEC. 2. All contractors and subcontractors for work in behalf of the City of Detroit, under contracts with the City of Detroit, or its authorized boards or officers, shall be required to insert in their contracts or agreements with said city, or said boards or officers, a clause assenting to the provisions and requirements of this ordinance, and on the failure or neglect of said contractor or subcontractor to observe and respect the provisions herein contained, the contract or agreement entered into by said contractor or subcontractor, shall be forfeited and so declared by the common council. Provided, however, that in the case of unfor-seen accident or calamity, the common council may declare that the contract shall not be forfeited.

And the party of the second part hereby agrees and asserts that in the fulfillment of their contract and in the performance of any and all work hereunder no non-resident alien shall be employed by said second party or by any agent, subcontractor or employé of said second party.

51 And the party of the second part hereby agrees as follows:

1st. To clean up and carry off from said street all the stone, earth or other rubbish, or material which may have accumulated during the construction of said work.

2d. To put and leave all side and cross walks in as good condition as at the commencement of the work, and at the intersection and crossing of streets where the same join said pavement, to leave the roadway in good condition for public use.

3d. To erect and maintain a good and sufficient fence, railing or barrier around any and all excavations necessary for said work, in such a manner as to prevent accidents; to place upon such railing, fence or barrier, at twilight on each day, suitable and sufficient colored lights, and keep them burning during the night; and further, to pay to, indemnify, and save the city harmless against all loss and damage which may be occasioned or arise by reason of any negligence or carelessness on its part in doing such work.

4th. To do all work in a thorough and workmanlike manner, and conform in every particular to the plans, specifications and directions of the Board of Public Works, and in a manner to interrupt as little as practicable the free use of the street by the public.

5th. To claim no extra allowance for any contingencies in doing the foregoing work in a good and workmanlike manner, whether specially set forth herein or not; and to claim no pay for materials, work or labor not completed and fully accepted as completed.

6th. Said work to be completed on or before October thirty-first (31st), 1898.

7th. To carry on the work under the supervision and direction of the Board of Public Works and its duly authorized superintend-

ents and inspectors, and at such points or places as the said board shall from time to time direct; and no part of the way to be paved shall be torn up or excavation made until the board shall direct, and then only shall the work be commenced and continued at such places as the board shall designate. And it is understood that such designation will not be made until the contractor is apparently ready to proceed with the work and complete the same.

8th. To notify, when it becomes necessary to disturb the gas pipes, lamp posts, service pipes, or other gas pipes or fixtures, or the water pipes or fixtures, or street railroad track, the gas company or superintendents of the water works or street railroads respectively, of said necessity, and that it will not cause, permit or suffer any hindrance or interference with the agents of said companies or superintendents in the protection or relaying of said pipes or fixtures or street railroad tracks.

52 9th. That it will not employ unfaithful or incompetent workmen or overseers, or disorderly persons; and that it will immediately discharge any person in its employ who is declared to be so, and whenever directed by said board.

10th. And further, that it will personally perform the several stipulations of this contract, or by workmen under its immediate superintendence, and not by a subcontractor. And also that it will give its own undivided attention to the work, and will not assign or transfer its interest, or any part thereof in this contract, to any person or persons without the concurrence of said board in writing.

11th. That it will give the Board of Public Works forty-eight (48) hours' notice before commencing the work.

12th. That the contractor will erect barriers, preventing travel upon or across the avenue, at such places as the Board of Public Works, its inspectors or superintendents shall direct, with signs announcing that the street is closed, and will maintain the same until their removal is ordered by the board.

13th. That the contractor will pay, indemnify and hold the City of Detroit harmless for and against all damages costs and expenses which the city may suffer or may come to it or arise from any act done or suffered by the said contractor or of any of his agents, subcontractors or employees, or of any neglect, default or omission by such contractor, his agents, subcontractors or employees to do or perform any act or duty imposed upon such contractor by the contract or by law.

It is mutually agreed by and between the parties hereto, as follows:

A. The said Board of Public Works shall have the power to diminish the quantity of the work during its progress, at a street crossing, without vitiating this contract, but no part of the work shall be altered by the contractor from that prescribed in the specifications, without the express sanction of the Board of Public Works, in writing.

B. The party of the second part, being notified by the Board of Public Works, in writing, that the work herein provided for is in their opinion, unnecessarily delayed, and will not be finished in the

prescribed time, the said board by and with the consent of the common council, may declare this contract forfeited on the part of the party of the second part, and the party of the first part shall not be liable for any unfinished work or material furnished therefor.

C. The contractor, its foreman or clerk, shall, upon or within six hours after receiving written notice from the Board of Public Works, at any time, and at all times, remove from the ground or works, whether worked or otherwise, all materials which may be unsound, improper and not corresponding with the specifications or drawings; and not approved by them and substitute and bring back good and proper materials in lieu thereof, and in case of default therein, the Board of Public Works shall be at liberty so to do at the cost and charge of the contractor.

53

And the said party of the first part, in consideration of the faithful and entire performance by said second party of the foregoing and following conditions and stipulations, and specifications and estimates hereto attached, hereby agrees to pay to the said party of the second part, as hereinafter provided and conditioned, the sum of one dollar and eighty-four ($1.84) $\frac{336}{1000}$ cents, in the manner hereinafter provided, for each and every square yard contained in the above work for the entire — thereof, and all work and materials necessary to complete the same: Provided, the whole shall be completed and accepted as such by the common council, on or before the date aforementioned for completing the same.

D. It is further mutually agreed, that the payments due said second party under this contract as above mentioned, shall be made in the following manner, to wit: The party of the first part shall, by warrants drawn on the city treasurer by the controller, upon estimates furnished from time to time by the Board of Public Works, pay the said contract price for grading and paving the interior spaces and intersections of cross-streets and alleys, and for cross-walks within the limits of the contemplated improvements and in front of other public property, for and in full of all work fully performed, and all materials furnished therefor by said party of the second part when the same shall be completed according to contract.

E. The party of the first part shall pay the party of the second part for the remainder of the contract price as above specified, bonds to be issued upon the faith and credit of the city or the proceeds of such bonds in case they should be purchased by the sinking-fund commissioners, in accordance with the provisions of sections 42 and 43 of chapter XI, of the charter of the City of Detroit, as amended May 4th, 1893, and agrees that said bonds shall be delivered to said second party within thirty days from the time of the completion and acceptance of the work contracted to be performed herein by said second party, said bonds to be accepted by said second party in full payment of all obligations of said first party for the portion of the work specified.

54

F. That all measurement and determination of quantities shall be made by the city engineer, and that his measurement shall be final and conclusive between the parties, and that nothing in this agreement contained shall be so construed as to deprive the

said city of any remedy or defense it may have under the same for any violation of any of the terms or conditions of this agreement; and the Board of Public Works shall have the right to require the party of the second part to suspend or discontinue the work, or any part thereof, when, in the opinion of said common council, or the said board, the party of the second part is not doing the work in accordance with the stipulations of this contract; and for such work and materials as shall not comply with the specifications the party of the second part shall forfeit and have no claim whatever therefor.

G. That in case the laying of said pavement, or any of the work shall be enjoined or delayed by reason or claim that the same is in violation of, or an infringement of any patent, the same shall not operate to or have the effect to constitute a breach of this contract or claim for damages by either party, and such work may be completed after such injunction or cause of delay shall be removed. The party of the first part shall defend any and all suits brought to restrain or enjoin such work and bring such suit to a final determination without unnecessary delay, and save the party of the second part harmless from damages and costs.

In witness whereof, the party of the first part has caused its seal to be affixed hereto, and the signatures of the members of the Board of Public Works, in its behalf, to be hereunto subscribed, and the party of the second part has hereunto set their hand and seal the day and year first above written.

ALCATRAZ CONSTRUCTION CO., [L. S.]
By OTTO E. C. GUELICH, *Attorney-in-fact.*
THE CITY OF DETROIT,
By D. W. H. MORELAND,
[SEAL.] JAMES W. MILLEN,
Board of Public Works.

Witness:
J. C. OLDFIELD.

Attest: CHAS. R. FORSTER,
Deputy City Clerk.

55 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

THE CASS FARM IMPROVEMENT COMPANY, LIMITED, ET AL.
vs.
THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, ET AL.

Russel & Campbell, solicitors for complainants.

GENTLEMEN: You will please take notice that the defendants The City of Detroit and The Board of Public Works claim the benefit of an appeal in the above cause.

Yours, etc.,
CHARLES FLOWERS,
Attorney for said Defendants.

March 3, 1900.

56 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the twelfth day of April, in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE CASS FARM IMPROVEMENT COMPANY, LIMITED, and Others, Complainants,
vs.
THE CITY OF DETROIT and Others, Defendants and Appellants.

This cause, coming on to be heard, is argued by Messrs. Russel and Campbell, for complainants, and by Mr. C. D. Joslyn, for defendants, and submitted.

57 *Opinion.*

STATE OF MICHIGAN:

Supreme Court.

THE CASS FARM IMPROVEMENT COMPANY, LIMITED, and Others, Complainants,
vs.
THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, and Others, Defendants.

This bill was filed to enjoin the City of Detroit from paving a portion of Second avenue, to have the proceedings taken with reference to said paving declared void and the collection of assessments enjoined.

The grounds of relief stated in the bill, in the amended bill and in the supplemental bill are:

1. That the provisions of the charter and of the paving ordinances of the city, in so far as the same provide for an assessment of the cost of paving upon the abutting property in propor-ion to the frontage of such property, were in violation of the Constitution of the United States and the amendments thereof, and therefore null and void;

2. That no detailed estimate of the cost of the proposed improvement had been furnished to the common council by the board of public works, as required by section 12, chapter 15, of the charter of the city;

3. That the advertisements for bids did not specify a time and place when and where the bids were to be opened in the presence of such persons as might choose to attend, as required by chapter 32, section 5, of the Revised Ordinances of the City of Detroit;

4. That the board of public works and the common council failed to comply with the requirements of sections 5, 6 and 7 of chapter 32 of the Revised Ordinances of the city;

5. That the work could not be completed within the time provided

in the contract and required by section 33 of chapter 11 of the charter of the city;

58 6. That substantially all of the work was done after the time named in the contract and after the time limited by the charter of the city of Detroit for doing the work, and that no extension of time had been procured authorizing the continuance of the contract after November 1st.

7. That sections 8 and 9 of chapter 32 of said ordinance, directing the manner in which the assessment-roll should be delivered to the board of assessors, had not been complied with, the assessment-roll not having been delivered to the board of assessors until after the completion of the work under the contract.

8. That the board of public works had accepted the work without deducting the penalty provided by the contract, of $25 per day, for delay, in case of a delay beyond the 1st of November.

It appears that the paving has been fully completed and the work accepted by the city.

1st It is contended that an inflexible rule which requires the assessments in all cases to be according to the frontage area or otherwise, regardless of the circumstances of each particular case, is but an arbitrary exaction, and therefore unconstitutional. It is said that the rule laid down in Norwood *vs.* Baker, 172 U. S., 269, should be followed by this court. That was a street-opening case, and it was held that the law which provided for assessing against the abutting property, in proportion to the frontage, the entire cost of the opening rests upon a basis which excludes any consideration of benefits, and violates the fourteenth amendment of the Constitution of the United States.

That doctrine was laid down by this court in Thomas *vs.* Cain, 35 Mich., 155; but that was a sewer case. In paving cases the rule has been settled in this State by many decisions that it is competent for the legislature to authorize the cost of paving streets to be assessed upon the abutting property according to frontage:

Williams *vs.* Mayor, 2 Mich., 560.
Motz *vs.* Detroit, 18 Mich., 495.
Sheeley *vs.* Detroit, 45 Mich., 431.
Kalamazoo *vs.* Francoise, 115 Mich., 554.

It was said by Mr. Justice Cooley in Sheley *vs.* Detroit, *supra*: "We might fill pages with the names of cases decided in other States which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law and on the law of taxation have collected the cases and have recognized the principal as settled; and if the question were new in this State we might think it important to refer to what they say; but the question is not new. It was settled for us thirty years ago."

59 We should feel inclined to follow the opinion of the Supreme Court of the United States in Norwood *vs.* Baker, *supra*, inasmuch as it was based upon the fourteenth amendment of the Constitution of the United States if that were a paving case; but that was a street-opening case; and until that court shall pass upon the question in the exact form in which it is here presented, we shall feel bound to follow our own decisions.

2d. Section 12 of chapter 15 of the charter provides that when any public improvement is proposed the common council shall refer the matter to the board of public works, who shall proceed to examine the same "and shall as soon as practicable report thereon to the common council, giving detailed estimates of the costs of such work or improvements, if any costs there will be, and will make such recommendation as such board of public works shall deem expedient." It appears that in the present case no resolution was adopted by the common council referring the matter to the board of public works, but that said board assumed the initiative and sent a recommendation to the common council that the street should be paved, furnishing the estimated costs as "Estimated costs, $40,000." It is claimed that this provision of the charter is mandatory and that a failure to comply with its terms rendered any subsequent action void. Counsel cite in support of this:

Butler *vs.* Detroit, 43 Mich., 552.
Mills *vs.* Detroit, 95 Mich., 422.

It is evident that the course taken in the present instance by the board of public works and the common council obviates the difficulties presented in the above cases. The board reported that the cost of such improvement would be $40,000. The city engineer made a detailed estimate of the costs. These matters were laid before the common council before the contract was approved and apparently were duly considered by it.

In Goodwillie *vs.* Detroit, 103 Mich., 286, it was said: "The duty of furnishing the estimate is imposed upon the board of public works. The council called upon the board for such estimates, and an estimate having been furnished and no further particulars having been called for, it must be assumed that the information was sufficiently specific to enable the council to act intelligently."

In Butler *vs.* City of Detroit, *supra*, the board of public works made no report as to the expediency of the proposed improvements, nor did it report any estimate of the costs.

In Mills *vs.* Detroit, *supra*, the board made no report whatever as to costs.

3d. Section 5, chapter 32 of the Revised Ordinances of the city, provides that the "advertisement for bids shall specify a time and place when and where such bids shall be opened by the board of public works in the presence of such persons as shall choose to attend." The advertisement which was actually published reads as follows: "Sealed proposals will be received at the office of the board of public works, Detroit, Michigan, until Tuesday, September

6, 1898, at 10 o'clock a. m., local time, for furnishing all labor,
60 materials," etc. The advertisement contains no statement that the bids will be opened at any time or that an opportunity will be afforded to any person interested to inspect them. It is contended that this requirement of the ordinance is jurisdictional, and that the proceedings based upon the advertisement which was actually published are null and void.

Under the statute creating the board of public works the details relating to the matters of public improvement rest with the board. The advertisement is subject only to the control of the board. The board is required to advertise for proposals and enter into a contract; but the contract does not become valid or binding until approved by the council. The board must determine what the specifications must be. The council can approve or reject them, but has nothing to do with making them. Before a contract can be entered into between the bidder and the board it must be approved by the council. The proofs show that the bids or proposals for this paving were opened in the office of the board of public works at 10 o'clock a. m., local time, on September 6, 1898, in public and in the presence of those who tendered bids, that being the time mentioned as the hour up to which bids would be received. The proofs also show that it had always been the custom of the board to open bids at the hour named. We think from this showing that no one was deprived of any right, and it would be a most technical rule to hold that the whole proceeding must fail and the complainants escape payment for a valuable public improvement by which they are benefited. Whether there was a compliance with the ordinance or not, no one being harmed, the proceedings will not be set aside for that reason.

4th. Among the other specifications attached to the contract is the following: "And if the contractor shall fail to complete the work by the time specified in the contract the sum of $25 per day for each and every day thereafter, until such completion, shall be paid to the city of Detroit through the board of public works before acceptance of the work." It appears that the work under the contract was accepted by the board January 3, 1899, and no deduction was made on account of delay, which it was claimed amounted to over thirty days. It is claimed that under these circumstances the board had no right to accept the work at all, or at least that it had no right to charge against the property-owners the entire cost of the work without making the deduction for the penalty provided in the specifications and that the board had no power to waive the penalty.

We think this claim cannot be sustained. The penalty clause in the contract has no relation whatever to the assessment. It is not provided by law, and it was evidently not intended for the benefit of the abutting property-owners, but for the city at large. The proper authorities have passed upon the question and have accepted the work as satifactory. The acceptance must be held conclusive.

Cooley on Taxation, 2d ed., p. 671.

The other questions raised have no force.

The court below was in error in setting the proceedings aside. That decree must be reversed and a decree entered here dismissing complainants' bill with costs of both courts.

CHAS. D. LONG.
C. B. GRANT.
R. M. MONTGOMERY.
F. A. HOOKER.
J. B. MOORE.

(Endorsed:) Filed June 5, 1900. Chas. C. Hopkins, clerk.

61 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the fifth day of June, in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT Walker, Jessie W. Radcliffe, and Bryant Walker, Administrator of the Estate of Joseph A. Moross, Deceased; William Craig, Alice C. Hutton, James Craig, Jr., Helen C. Fry, and S. A. Buchanan, Complainants,

vs.

THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS (Appellants), and Others, Defendants.

This cause having been brought to this court by appeal from the circuit court for the county of Wayne, in chancery, and having been argued by counsel and due deliberation had thereon, it is now ordered, adjudged, and decreed by the court that the decree of the circuit court for the county of Wayne, in chancery, be, and the same is hereby, reversed, vacated, and held for naught, and the bill of complaint dismissed; and it is further ordered, adjudged, and decreed that the appellants do recover of and from the complainants their costs of both courts, to be taxed.

62 STATE OF MICHIGAN:

Supreme Court.

CASS FARM COMPANY, LIMITED, ET AL., Appellees,

vs.

CITY OF DETROIT ET AL., Appellants.

Now come the said complainants and appellees and respectfully move the court that a rehearing be granted in the above-entitled cause for the following reasons, to wit:

1. Because complainants believe that the court erred in holding "Whether there was a compliance with the ordinance or not, no one being harmed, the proceeding will not be set aside for that reason."

2. Because complainants believe that the ruling aforesaid is unconstitutional and void for the reason that it deprives the complainants of property without due process of law.

3. Because complainants believe that the court erred in holding that "under the statute creating the Board of Public Works, the details relating to the matter of public improvements rest with the board."

RUSSEL & CAMPBELL,
Solicitors for Complainants.

(Endorsed:) Filed June 27, 1900. Chas. C. Hopkins, clerk.

63 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the third day of July, in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE CASS FARM COMPANY, LIMITED, and Others
vs.
THE CITY OF DETROIT and Others.

In this cause a motion for a rehearing is duly submitted.

64 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the sixteenth day of October, in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE CASS FARM IMPROVEMENT COMPANY, LIMITED, and Others, Complainants,
vs.
THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, and Others, Defendants.

The motion for a rehearing heretofore submitted herein, having been duly considered by the court, is hereby denied with costs to the defendants.

65 STATE OF MICHIGAN:

Supreme Court.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, Jessie W. Radcliffe, Bryant Walker, Administrator of the Estate of Joseph A. Moross, Deceased; William Craig, Alice C. Hutton, James Craig, Jr., Helen C. Fry, and S. A. Buchanan, Complainants and Appellees,

vs.

THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Asphalt Paving Company, Defendants and Appellants.

It is hereby stipulated in the foregoing cause by the respective parties thereto, through their solicitors, that Exhibit "A," beginning on page 10 of the printed Record in this cause; Exhibit "B," on page 30 of said printed Record; Exhibit "C," on page 32 of said printed Record, and Exhibit "D," beginning at page 33 and extending to page 62 of said printed Record, are true copies of the said exhibits as originally used in evidence in said cause on the hearing thereof in the circuit court for the county of Wayne, in chancery, and that the said printed copies thereof, as contained in said printed record, shall stand in lieu of the said originals in this court.

It is further stipulated that sections 34, 35, 36, and 37 of chapter 11 of the charter of the city of Detroit were duly in evidence on the hearing of said cause, and that Exhibit "A," attached to this stipulation, is a true copy of the said sections so in evidence.

66 It is further stipulated that sections 2, 3, 4, 5, 6, 7, and 8 of chapter 32 of the Revised Ordinances of the City of Detroit were duly in evidence on the hearing of said cause, and that Exhibit "B," attached to this stipulation, is a true copy of the said sections so in evidence.

RUSSEL & CAMPBELL,
Solicitors for Complainants and Appellees.

TIMOTHY E. TARSNEY,
Solicitor for City of Detroit, Board of Public Works, D. W. H. Moreland, James W. Millen, and H. Kallman, Defendants and Appellants.

EDWIN F. CONELY,
Solicitor for Otto E. C. Guelich, Defendant and Appellant.

JNO. J. SPEED,
Solicitor for Alcatraz Asphalt Paving Company, Defendant and Appellant.

Endorsed: Filed Dec. 6, 1900. Chas. C. Hopkins, clerk.

67 EXHIBIT "A."

Charter of the City of Detroit, Chapter 17.

SEC. 34. For the purpose of such assessment, the lots and parcels of real estate situated on said street, and fronting the portion thereof ordered to be improved, shall constitute one local assessment district, unless the common council, with a view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts. Such subdivision, if made, must be done before asking for bids for the work; and in no case shall a city block be divided in making such division. The work for such local assessment district shall be bid for and let separately, and such bidding and letting shall show:

First. The cost of all paving and grading, except that of the intersection of the cross-streets and alleys, the cost of the cross-walks at such intersections, and the cost of repaving.

Second. The cost of the paving and grading of each portion of the street included within the lines of intersection of any cross-street and alleys.

Third. The cost of the cross-walks at such intersections: Provided, that in case where a side street merely opens upon and does not extend across the street to be paved, the space formed by extending the lines of the former street to the middle of the latter street shall, for the purpose of this act, be treated as the spaces formed by the intersection of cross-streets. All necessary platforms and curbings shall, for the purpose of such assessment, be deemed to be included within the term paving. (As amended by act approved June 24, 1887.)

SEC. 35. The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross-streets and alleys, and for the cross-walks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably, according to their extent of front on the lots, parts of lots, or parcels of real estate directly fronting on
68 and within the local assessment district; provided, that if the assessment made on any such lot, or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the common council to be inequitable, said council may direct a just portion of such assessment to be paid from the general road fund. The cost of the work within the lines of the intersection of cross-streets, and also the cost of the cross-walks, shall be paid out of the general road fund. The cost of all repaving of streets, avenues and highways of the city shall be paid out of the repaving fund. The word "front" as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved. (As amended by act approved June 24, 1887.)

SEC. 36. Whenever in the improvement of a street as aforesaid, any land or real estate which has not been duly platted into city

blocks, or lots, shall be required to be assessed to pay any part of the cost of such improvement, the council shall designate such part or parts thereof for such assessments, as shall correspond as near as practicable to the portion of the block or blocks nearest adjacent thereto, subject to like assessment, and the part or parts so designated shall be assessed as near as may be, in the manner herein provided for the assessment of lots.

SEC. 37. The board of assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate, constituting a local assessment district as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate, so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list, ratable upon the several lots and parcels of real estate according to the length of front thereof. When the assessment-roll is thus completed, said board shall give
69 notice, by at least five publications in the city paper, that such roll is completed, and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of such roll, sign the same and report it to the common council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections. And when the same shall be corrected to the satisfaction of said council, it shall, by resolution, confirm the same. After such confirmation such assessment shall constitute a lien, until paid, upon said lots or parcels of real estate, and shall be collected in such manner as may be authorized by law.

70 EXHIBIT "B."

Revised Ordinances of the City of Detroit, Chapter 32.

SEC. 1. Streets, or parts thereof, may be ordered to be graded and paved, by resolution of the common council, on motion of any member thereof, at a total cost to be expended in any one year not exceeding $200,000. (As amended December 30, 1889.)

SEC. 2. Streets, or parts thereof, may also be ordered to be graded and paved, by resolution of the common council, on petition of parties owning a majority of property fronting on the line of such street, or the part thereof proposed to be paved. Such primary petition shall pray generally that the street, or a specified part thereof, be graded and paved; and the preference of the petitioners, or other parties interested, as to the kind of pavement they desire, may be shown by subsequent petition.

SEC. 3. When a street, or part thereof, is ordered to be graded and paved, the resolution shall declare generally that it is ordered that the street, within specified limits, be graded and paved, and shall

direct what kind of pavement may be advertised for, and that for the purpose of assessment to defray the expense of such improvement, the lots and parcels of real estate situated upon such street, and fronting on the portion thereof ordered to be improved, shall constitute a local assessment district; or two or more assessment districts may be thus established, of not less extent than one block each, in the discretion of the council.

SEC. 4. The city engineer, upon the passage of the resolution establishing a local assessment district, as provided in section 3, shall forthwith proceed to ascertain the quantities of work and material requisite to the improvement so ordered, and to estimate and apportion the expense of advertising and blanks, and of inspection of the work during its progress, and shall make a report of the same in duplicate, over his signature, as near as conveniently may be, according to form "A," hereto attached, and deliver one to the
71 assessor and one to the board of public works.

Form A.

(For the city engineer to report quantities to the board of public works and assessor.)

OFFICE OF THE CITY ENGINEER,
DETROIT, —— —, 18—.

Quantities for grading, paving, etc., —— from the —— line of —— to the —— line of ——, exclusive of the quantities within the line of the cross-streets and alleys.

Quantities.	Description of work.
Cubic yards.....	Excavation.....
Lineal feet	Curbstone.....
Square yards.....	Paving.....

	Dollars.	Cents.
Proportion of cost of advertising and blanks to be paid by tax.....		
Proportion of inspector's compensation to be paid by tax.....		

For the City.

The quantities within the lines of the intersections of the cross-streets and alleys and the cross-walks within such intersections.

Quantities.	Description of work.
Cubic yards.....	Excavation.....
Lineal feet.....	Curbstone.....
Square yards.....	Paving.....
Square feet.....	Stone culvert platform.....
Square feet.....	Wooden " " .....
Square feet.....	Rec'g basin.....
.....	.....
.....	.....
Square feet.....	Cross-walks.....

	Dollars.	Cents.
City's proportion of cost of advertising and blanks..		
City's proportion of inspector's compensation.....		

72 I hereby certify that the above quantities and estimates are correct.

_____,
City Engineer.

SEC. 5. It shall be the duty of the board of public works, as soon as they receive the report of the engineer, in section 4 above provided for, to proceed to advertise fifteen days, unless otherwise ordered by resolution of the common council, in the official city paper, for bids for the making of such improvements, with the kind of pav-ments they shall have been directed to advertise for by the council, and as required by the city charter. Such advertisement shall specify a time and place when and where such bids shall be opened; at which time and place such bids shall be opened by the board of public works, in the presence of such persons as shall choose to attend; and the board shall then report to the council all the bids received for each kind of pavement advertised for, designating the lowest responsible bidder. (As amended July 14, 1884.)

SEC. 6. Upon presentation of the report of the board of public works, in section 5 above provided, the common council may, by resolution, direct said board to contract with such of the lowest responsible bidders reported by the board, as it shall see fit; or direct further advertisement for the same, or different kinds of pavement, in its discretion; and then direct said board to contract with such

lowest bidder, for such kind of pavement as is deemed expedient to adopt for the improvement.

SEC. 7. Upon the passage of the resolution in section 6 above provided, the board of public works shall forthwith proceed to enter into a contract with the party designated therein, and take sufficient security for its faithful performance. Such contract shall, among other things, provide:

1. That the city shall pay for grading and paving the interior spaces at the intersection of cross-streets and alleys, and for the cross-walks within the limits of the contemplated improvements, when the same shall have been completed according to the contract at either crossing.

73 2. That the contractors shall be paid for the remainder of the improvement by bonds to be issued upon the faith and credit of the city for the cost of paving such remaining portion of the improvement or the proceeds of said bonds, should they be purchased by the sinking-fund commissioners, in accordance with the provisions of sections 42 and 43 of chapter 11, of the charter of the city of Detroit, as amended May 4, 1893.

3. That the contractors shall follow the direction of the inspector of pavement as to the manner of doing the work and abide his decision as to the quality of the material to be used in the same, where questions arise within the specifications of the contract as to the compliance therewith; subject only to appeal to the decision of the comptroller and chairman of the committee on streets in behalf of the contractors, whose decision upon such appeal shall be final, and the work be stopped at the point of question, till the requirements of such decision are complied with.

4. Such contract shall contain such other provisions, usual in such contract, as the board of public works shall deem necessary and proper and for the interest of the city, and as are required by the ordinances and charter; and when such contract is duly executed the same shall be reported by the board of public works to the council for confirmation, and the council may either confirm or reject the same or require such additional provisions inserted as shall to it seem necessary, and after the same is amended and executed may confirm the same. (As amended June 7, 1893.)

74 UNITED STATES OF AMERICA, *ss:*

To City of Detroit, the Board of Public Works of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and the Alcatraz Paving Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Michigan, wherein Cass Farm Company, Limited; J. O. Harris, Bryant Walker, Jessie W. Radcliffe, Bryant Walker, administrator of the estate of Joseph A. Moross, deceased; William Craig, Alice C. Hutton, James Craig, Jr., Helen C.

Fry, and S. A. Buchanan are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert M. Montgomery, chief justice of the supreme court of Michigan, this fifth day of November, in the year of our Lord one thousand nine hundred.

ROBERT M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

[Endorsed:] Supreme Court of United States. Cass Farm Company, Limited, *et al. vs.* City of Detroit *et al.* Citation. Filed Nov. 9, 1900. Chas. C. Hopkins, clerk. H. M. Campbell, of counsel for plaintiffs in error, 604 Union Trust building, Detroit, Michigan.

We, the undersigned, accept service of the within citation.

EDWIN F. CONELY,
Counsel for Def't Otto E. C. Guelich.
J. J. SPEED,
Counsel for Def't Alcatraz Asphalt Paving Co.
T. E. TARSNEY,
Counsel for Def'ts City of Detroit, Board of Public Works of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen.

75 *Bond.*

Know all men by these presents that we, Cass Farm Company, Limited, as principal, and Henry B. Ledyard and Henry Russel, as sureties, are held and firmly bound unto City of Detroit, Board of Public Works of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Asphalt Paving Company in the full and just sum of two hundred fifty ($250.00) dollars, to be paid to the said City of Detroit, Board of Public Works of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Asphalt Paving Company, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of November, in the year of our Lord one thousand nine hundred.

Whereas lately, at a session of the supreme court of the State of Michigan, in a suit depending in said court between Cass Farm Company, Limited; J. O. Harris, Bryant Walker, Jessie W. Radcliffe, Bryant Walker, administrator of the estate of Joseph A. Moross, deceased; William Craig, Alice C. Hutton, James Craig, Jr., Helen C. Frey, and S. A. Buchanan, complainants, and The City of Detroit, The Board of Public Works of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Paving Company, defendants, a decree was rendered against the said com-

plaintants, and the said complainants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said City of Detroit, The Board of Public Works of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Paving Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Cass Farm Company, Limited; J. O. Harris, Bryant Walker,
76 Jessie W. Radcliffe, Bryant Walker, administrator of the estate of Joseph A. Moross, deceased; William Craig, Alice C. Hutton, James Craig, Jr., Helen C. Frey, and S. A. Buchanan shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CASS FARM COMPANY, LIMITED.
H. M. CAMPBELL, *Treasurer.*
H. B. LEDYARD.
HENRY RUSSEL.

Sealed and delivered in presence of—
CHARLES H. CAMPBELL.
WILLIAM SCOTT.

Approved by—

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

77 Supreme Court of the United States, October Term, 1901.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, Bryant Walker, Jessie W. Radcliffe, Bryant Walker, Administrator of the Estate of Joseph A. Moross, Deceased; William Craig, Alice C. Hutton, James Craig, Jr., Helen C. Fry, and S. A. Buchanan, Plaintiffs in Error, *vs.* THE CITY OF DETROIT, THE BOARD OF Public Works, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Asphalt Paving Company, Defendants in Error.	Error to the Supreme Court of the State of Michigan.

And now come the plaintiffs in error in this cause, by Russel & Campbell, their attorneys, and say that in the record, proceedings, and decree entered in this cause there is manifest error in this:

1. That the said supreme court of the State of Michigan erred in not declaring sections 34, 35, 36, and 37 of chapter 11 of the charter of the city of Detroit, which provide that property fronting on the

portion of a street ordered to be paved constitutes the legal assessment district, and directing that the board of assessors are required to assess the cost of the improvement against such property ratably according to frontage, to be void, said provisions being in violation of the fourteenth amendment to the Constitution of the United States.

2. That said supreme court of the State of Michigan erred in not declaring sections 2, 3, 4, 5, 6, 7, and 8 of chapter 32 of the Revised Ordinances of the City of Detroit, which provide for the assessment of the cost of paving of streets against the abutting property owners according to the front foot on said street, to be void, said provisions being in violation of the fourteenth amendment to the Constitution of the United States.

RUSSEL & CAMPBELL,
Att'ys for Plaintiffs in Error.
HENRY M. CAMPBELL,
Of Counsel.

78 STATE OF MICHIGAN, } *ss:*
County of Wayne, }

Henry Ledyard, being duly sworn, deposes and says that on the 19th day of November, 1900, he served a copy of the within assignment of errors upon Timothy E. Tarsney by presenting it to him in person; a second copy of said assignment of errors upon John J. Speed by delivering it to the clerk in charge of his office, and a third copy of said assignment of errors upon Edwin F. Conely by delivering it to the clerk in charge of his office.

HENRY LEDYARD.

Sworn to and subscribed before me this 19th day of November, 1900.

[Seal of William Scott, Notary Public, Wayne County, Mich..]

WILLIAM SCOTT,
Notary Public, Wayne County, Michigan.

78½ [Endorsed:] Original. Supreme Court of the United States. Cass Farm Company, Limited, *et al.*, plaintiffs in error, *vs.* The City of Detroit *et al.*, defendants in error. Plaintiffs' assignment of errors. Filed Nov. 21, 1900. Chas. C. Hopkins, clerk. Russel & Campbell, att'ys for plaintiffs, 604 Union Trust building, Detroit.

79 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Michigan, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had

in the said suit between Cass Farm Company, Limited; J. O. Harris, Bryant Walker, Jessie W. Radcliffe, Bryant Walker, administrator of the estate of Joseph A. Moross, deceased; William Craig, Alice C. Hutton, James Craig, Jun'r, Helen C. Fry, and S. A. Buchanan, complainants, and The City of Detroit, The Board of Public Works of Detroit, D. W. H. Moreland, H. Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Asphalt Paving Company, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construe-
80 tion of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Cass Farm Company, Limited; J. O. Harris, Bryant Walker, Jessie W. Radcliffe, Bryant Walker, administrator of the estate of Joseph A. Moross, deceased; William Craig, Alice C. Hutton, James Craig, Jun'r, Helen C. Fry, and S. A. Buchanan, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of November, in the year of our Lord one thousand nine hundred.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed by—

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

[Endorsed:] Supreme Court of United States. Cass Farm Company, Limited, *et al. vs.* City of Detroit *et al.* Writ of error. Filed Nov. 9, 1900. Chas. C. Hopkins, clerk.

81 Supreme Court of the State of Michigan.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, Jessie W. Radcliffe, Bryant Walker, Administrator of the Estate of Joseph A. Moross, Deceased; William Craig, Alice C. Hutton, James Craig, Jr., Helen C. Fry, and S. A. Buchanan, Plaintiffs in Error,

vs.

THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, D. W. H. Moreland, H Kallman, James W. Millen, Otto E. C. Guelich, and The Alcatraz Asphalt Paving Company, Defendants in Error.

STATE OF MICHIGAN, } *ss:*
In Supreme Court, }

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court, as appears of record and on file in —— cause; that I have compared the same with the originals, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon, a copy of the bond to the adverse party, duly approved, filed with the writ of error, the citation, with proof of service endorsed thereon, and the assignment of errors in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at the city of Lansing, this eighth day of December, A. D. 1900.

[Seal of the Supreme Court of Michigan—Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No., 17,993. Michigan supreme court. Term No., 508. Cass Farm Company (Limited), J. O. Harris, *et al.*, plaintiffs in error, *vs.* The City of Detroit, The Board of Public Works of Detroit, *et al.* Filed December 13, 1900.

No. 508.

Office Supreme Court U. S.
FILED
JAN 25 1901
JAMES H. McKENNEY,
Clerk.

Motion to Advance.

No. 508.

Filed Jan. 25, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

CASS FARM COMPANY, Limited, et al.,
Plaintiffs in Error,

vs.

THE CITY OF DETROIT et al.,
Defendants in Error.

Motion to Advance Cause and Affidavits in Support of Motion.

HENRY M. CAMPBELL,
Counsel for Plaintiffs in Error.

TIMOTHY E. TARSNEY,
Counsel for Defendants in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1901.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

THE CASS FARM COMPANY, LIMITED, J. O. HARRIS, BRYANT WALKER, JESSIE W. RADCLIFFE, and BRYANT WALKER, Administrator of the Estate of Joseph A. Moross, deceased; WILLIAM CRAIG, ALICE C. HUTTON, JAMES CRAIG, JR., HELEN C. FRY, and S. A. BUCHANAN,
Plaintiffs in Error,
vs.
THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, D. W. H. MORELAND, H. KALLMAN, JAMES W. MILLEN, OTTO E. C. GUELICH and THE ALCATRAZ ASPHALT PAVING COMPANY,
Defendants in Error.

No. 508.

MOTION TO ADVANCE CAUSE.

And now come the plaintiffs in error, by Henry M. Campbell, their counsel, and respectfully move this Court that the above entitled cause be advanced on the call and order on the docket and be set for hearing on the 25th day of February, 1901, for the following reasons, to wit:

1. Because the cause, as shown by the record and the accompanying affidavits, involves similar questions and the construction of the same provisions of the charter and ordinances of the City of Detroit as are in issue in the case of the City of Detroit and others, plaintiffs in error, vs. Ralzemond A. Parker, defendant in error, No. 411 in the October term, 1900, the hearing of which case has been set by this Court for the said 25th day of February, 1901; and also involves the same constitutional questions as are at issue in case No. 498 in said October term, 1900,

which has also been set for hearing on said 25th day of February, 1901.

2. Because the special and peculiar circumstances and the considerations of public interest fully set forth in the motion papers to advance said suit of City of Detroit vs. Parker, No. 411, to which reference is hereby made, apply with equal force to the advancement of the above entitled cause.

HENRY M. CAMPBELL,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

THE CASS FARM COMPANY, LIMITED, J. O. HARRIS, BRYANT WALKER, JESSIE W. RADCLIFFE, and BRYANT WALKER, Administrator of the Estate of Joseph A. Moross, deceased; WILLIAM CRAIG, ALICE C. HUTTON, JAMES CRAIG, JR., HELEN C FRY, and S. A. BUCHANAN, Plaintiffs in Error, vs. THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, D. W. H. MORELAND, H. KALLMAN, JAMES W. MILLEN, OTTO E. C. GUELICH and THE ALCATRAZ ASPHALT PAVING COMPANY, Defendants in Error.	No. 508.

STATE OF MICHIGAN, }
COUNTY OF WAYNE. } ss.

Henry M. Campbell, being duly sworn, deposes and says that he is counsel for the plaintiffs in error in the above entitled cause; also that he is treasurer of the plaintiff in error Cass Farm Company, Limited. That he

has had personal management and conduct of the above entitled suit, and that the questions involved in this cause are similar to those in the case of City of Detroit and others, plaintiffs in error, vs. Ralzemond A. Parker, defendant in error, No. 411, October term, 1900, of this Court, which has been set for hearing by this Court on the 25th day of February, 1901, and involves the validity of the same provisions of the charter and ordinances of the City of Detroit.

The above entitled cause is brought to this Court upon writ of error to the Supreme Court of the State of Michigan, the decision of said Court being in direct conflict with that of the Circuit Court of the United States for the Eastern District of Michigan, rendered in the suit of the City of Detroit vs. Parker, above mentioned.

That all of the special and peculiar circumstances and the considerations of public interest fully set forth in the motion papers to advance said suit of the City of Detroit vs. Parker, No. 411, to which reference is hereby made, apply with equal force to the advancement of the above entitled cause.

HENRY M. CAMPBELL.

Subscribed and sworn to before me this 22d day of January, 1901.

HENRY LEDYARD,
Notary Public, Wayne County, Michigan.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

THE CASS FARM COMPANY, LIMITED, J. O. HARRIS, BRYANT WALKER, JESSIE W. RADCLIFFE, and BRYANT WALKER, Administrator of the Estate of Joseph A. Moross, deceased; WILLIAM CRAIG, ALICE C. HUTTON, JAMES CRAIG, JR., HELEN C. FRY, and S. A. BUCHANAN,
Plaintiffs in Error,
vs.
THE CITY OF DETROIT, THE BOARD OF PUBLIC WORKS, D. W. H. MORELAND, H. KALLMAN, JAMES W. MILLEN, OTTO E. C. GUELICH and THE ALCATRAZ ASPHALT PAVING COMPANY,
Defendants in Error.
} No. 508.

STATE OF MICHIGAN, }
COUNTY OF WAYNE. } ss.

Timothy E. Tarsney, being duly sworn, deposes and says that he is corporation counsel of the City of Detroit and has appeared as counsel for the defendants in error in the above entitled cause in this court. That the questions involved in the said cause in this court are similar to those at issue in the case of City of Detroit and others, plaintiffs in error, vs. Ralzemond A. Parker, defendant in error, No. 411, October term, 1900, which has been set for hearing by this court on the 25th day of February, 1901, and involve the validity of the same provisions of the charter and ordinances of the City of Detroit.

And on behalf of the defendants in error, the deponent respectfully joins in the motion made by the plaintiffs in error in this cause, and asks that the hearing of this cause

may be had on the said 25th day of February, 1901, at the time of the hearing of said case of the City of Detroit and others, plaintiffs in error, vs. Raizemond A. Parker, defendant in error.

TIMOTHY E. TARSNEY.

Subscribed and sworn to before me this 22nd day of January, 1901.

HENRY LEDYARD,
Notary Public, Wayne County, Michigan.

No. 508. Original

Brf. of Campbell for

(17,993.)

Office Supreme Court U.S.
FILED
FEB 23 1901
JAMES H. MCKENNEY,
Clerk.

Filed Feb. 23, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 508.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, ET AL.,

Plaintiffs in Error,

vs.

CITY OF DETROIT, THE BOARD OF PUBLIC WORKS OF DETROIT, D. W. H. MORELAND, ET AL.

BRIEF OF HENRY M. CAMPBELL, COUNSEL FOR PLAINTIFFS IN ERROR.

(17,993.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 508.

CASS FARM COMPANY, LIMITED; J. O. HARRIS, BRYANT WALKER, et al., Plaintiffs in Error. vs. CITY OF DETROIT, THE BOARD OF PUBLIC WORKS of Detroit, D. W. H. MORELAND, et al.	In Error to the Supreme Court of the State of Michigan.

BRIEF OF HENRY M. CAMPBELL, COUNSEL FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This case is brought to this Court from the Supreme Court of Michigan by writ of error, upon the ground that a constitutional question is involved. The question raised has also been passed upon by the Circuit Court of the United States for the Eastern District of Michigan. The decision of the State Court is in conflict with that of the United States Circuit Court Both cases are here submitted together.

The bill in the present case was filed to set aside and declare null and void proceedings taken by the Common Council of the City of Detroit to pave a portion of Second avenue in said city. The property where the improvement was to be made was outlying property, not built up, there being only three houses upon the street along the entire distance covered by the improvement. None of the property owners were in favor of having the street paved at the time when it was done, and substantially all of them protested against the proceedings and joined in the present suit. The pavement which was laid was an asphalt pavement upon a concrete foundation, of an expensive type,

and such as would be suitable in a thickly settled portion of a large city.

The proceedings were taken under the charter and ordinances of the city, the material provisions of which are as follows:

> Section 6, Chapter 11 of the City Charter: "That the Common Council shall not, in any one year, enter into contracts for the grading and paving of streets, alleys and public places, the cost of which will exceed in the aggregate $200,000.00, except upon the petition of the holders of the larger portion of the real estate directly abutting upon the portions of the street or alley proposed to be improved."
>
> Section 34, Chapter 11, of the Charter: "For the purpose of such assessment, the lots and parcels of real estate situated on said street and fronting the portion thereof ordered to be improved, shall constitute one local assessment district, unless the Common Council, with the view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts."
>
> Section 35, Chapter 11, of the Charter: "The cost and expenses of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for cross walks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably, according to their extent of front on the lots, parts of lots or parcels of real estate directly fronting on and within the local assessment district; provided, that if the assessment made on any such lot or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the Common Council to be inequitable, said council may direct a just portion of such assessment to be paid from the general road fund. * * * The word 'front,' as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved."
>
> Section 37, Chapter 11, of the Charter: "The board of assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate, constituting a local assessment district as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate, so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list,

ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice, by at least five publications in the city paper, that such roll is completed and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of such roll, sign the same and report it to the Common Council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections, and when the same shall be corrected to the satisfaction of said council, it shall, by resolution, confirm the same."

Section 1, Chapter 32, of the Revised Ordinances: "Streets or parts thereof may be ordered to be graded and paved by resolution of the Common Council, on motion of any member thereof, at a total cost to be expended in any one year not exceeding $200,000.00."

The other ordinances of the city provide for the letting of contracts for the performance of work, and the assessment of the cost. They nowhere provide for any notice at any stage of the proceedings, or any opportunity of being heard. The only provision for notice of any kind is found in Section 37, Chapter 11, of the Charter, above stated. The scope of this notice is considered hereafter.

In the present instance the paving was ordered by the Common Council under Section 6 of Chapter 11 of the Charter, and Section 1, Chapter 32, of the Ordinances, commonly known as the "forced paving clause." No one petitioned for the improvement. All of the persons upon whom the entire burden of the cost of the improvement was imposed protested against it. No opportunity was given them to be heard either as to the necessity, the character or the cost of the improvement; neither were they permitted to show whether or not a benefit would result to them by reason thereof, unless Section 37 of the Charter affords such an opportunity.

CONSTITUTIONAL QUESTIONS INVOLVED.

The constitutional questions involved may be stated as follows:

1. Is the rule of assessment prescribed by the charter and ordinances above stated such as to exclude any inquiry as to special benefits, and is its necessary operation, to the extent of the excess of the cost of improvement over any special benefits

accruing to the abutting property therefrom, to take private property for public use without compensation?

2. Is the exaction from the property owners, under the "forced paving clause" above referred to, of the entire cost of improvement without affording the property owners an opportunity of being heard at any stage of the proceedings, a taking of private property for public use without compensation and without due process of law?

CHARACTER OF THE TAX.

The first question for consideration is the character of the tax and the grounds upon which the power to levy the tax rests.

The authorities, at least all of the modern ones, are agreed that the tax does not fall within the category of general taxes and cannot be sustained upon the principles applicable to them.

"Special assessments are a peculiar species of taxation, standing apart from the general burden imposed for State and municipal purposes and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the person taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds, and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are supposed to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies."

Cooley on Taxation, 2nd Ed., 606.

"Assessments for the opening, making, improving or repairing of streets, the draining of swamps, and like local works, have generally been made upon property with some reference to the supposed benefits which the property would receive therefrom. Instead, therefore, of making the assessment in-

clude all the property of the municipal organization in which the improvement is made, a new and special taxing district is created, whose bounds are confined to the limits within which property receives a special and peculiar benefit in consequence of the improvement."

Cooley, Constitutional Limitations, 497.

"Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; and, to the extent of special benefits, it is everywhere admitted that the legislature may authorize local taxes or assessments to be made."

2 Dillon, Municipal Corporations, Secs. 761-763.

Brewer, J.: "Between taxes, or general taxes as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the State as a State, the consideration of which is protection by the State, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute, and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. * * *

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement."

Illinois Cent. R. R. vs. Decatur, 147 U. S., 197.

"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful as constituting an attempt to appropriate private property to public uses."

Thomas vs. Gain, 35 Mich., 162.

"To permit individuals to be taxed to pay for a public improvement to the extent of the peculiar benefit which they receive from such improvement, is not unjust or inequitable; but any exaction beyond this, exclusively from such individuals, is an act which involves the ability on the part of the community to confiscate, for its own purposes, the property of the citizen."

Tidewater Company vs. Coster, 18 N. J. Eq., 531.

Further citation of cases is unnecessary. The distinction between general and special taxes is universally conceded. The only theory upon which a special tax or assessment can be sustained is that the property against which it is levied is enhanced in value by the improvement, and that a charge to the extent to which the property is benefited by the improvement imposes no burden upon it.

In this respect there is no difference in principle between a tax or assessment for the cost of opening a street and a tax or assessment for the cost of improving a street already opened.

Cooley on Taxation, 2nd Ed., 611-612.
Bauman vs. Ross, 167 U. S., 593.
Kansas City vs. Smart, 128 Mo., 294.

METHOD OF DETERMINING THE QUESTION OF BENEFIT.

It being conceded that the right to levy special assessments cannot be attributed to the power of the legislature to impose general taxes, but rests solely upon the ground that a benefit commensurate with the cost results from the improvement, a vital question arises as to the method of determining the extent of the benefits as a measure of the amount which can be locally assessed against the property receiving the improvements.

This question has given rise to endless discussion in the courts and an infinite variety of opinion.

The want of harmony among the cases is largely due to a failure to discriminate between the exercise of power which is legislative in its nature and that which is judicial or quasi-judicial.

The legislature, in the exercise of its legislative functions, has no right to assess or levy taxes of any kind. It can prescribe the rules under which taxes are levied by persons or bodies duly empowered to act for the purpose. The action of the legislature in prescribing the rules is one thing; the exercise of the power conferred is of another and entirely different

nature. The legislature may declare the rules under which special assessments may be laid. The action of the body authorized to levy the tax is of a different character and subject to different considerations. The one is legislative; the other is judicial or quasi-judicial. The one declares the law; the other carries the law so declared into effect. The legislative power is limited, however, by the restriction that it shall not prescribe such rules as cannot be carried into effect without the destruction of individual rights guaranteed by the constitution.

Many of the earlier cases hold that the power of the legislature to make special assessments is unlimited, and that when such power has been exercised, it cannot be inquired into, but is conclusive.

Other cases, while holding that the right to make special assessments rests upon the benefits conferred by the improvements authorized, say that the question of the extent of the benefit is one of legislative discretion, to be determined by the legislative body, its determination being conclusive, even though in advance.

Still other cases decide that the question, being one of fact, can only be determined by a tribunal in possession of information of the precise case to be passed upon, and that the party to be affected has a constitutional right to be heard before he is concluded by the decision of the taxing body which deprives him of his property.

This confusion of opinion has finally resolved itself into two entirely distinct lines of decisions, which are absolutely irreconcilable.

(a) One line of cases, while conceding that the power to assess rests upon the benefit conferred, proceeds upon the theory that the question of the amount to be assessed because of such benefit is one of legislative expediency.

The leading case upholding this doctrine is *People vs. Brooklyn*, 4 N. Y., 419. This case holds that the making of a local assessment is an exercise of the power of taxation vested in the general government, and that the discretion of the legislature in determining the persons against whom the assessment shall be levied is without limitation, and, having been exercised, cannot be inquired into.

See also cases cited, 25 *American & English Encyclopedia of Law*, 496-506.

(b) The other line of cases above referred to asserts the doctrine that the legislative power is not unlimited, and that assessments must be apportioned by some rule capable of producing reasonable equality, and that a rule which imposes a burden in excess of the actual benefits received is an arbitrary

exaction which it is beyond the power of the legislature to make.

"It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed. If it is not conceivable that the rule prescribed is one which will apportion the burden justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle."

Thomas vs. Gain, 35 Mich., 162.

The Supreme Court of Massachusetts, in speaking of local assessments, says: "It is well established that taxation of this kind is permissible under the constitution of this commonwealth and under the constitution of the United States, only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits."

Sears vs. Street Commissioners, 173 Mass., 352.

"The legislature, in the plenitude of its taxing power, cannot have constitutional power to exact from one citizen, or even one county, the entire revenue of the commonwealth. Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would undoubtedly be the taking of private property for public use, and which could not be done constitutionally without the consent of the owner, without retribution of the value in money."

Hammett vs. Philadelphia, 65 Pa. St., 152.

"In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law making power to concentrate the burden of a tax upon specified property, does not exist. * * * It follows, then, that these local assessments are justifiable on the ground above, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case, no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universally condemned, both on moral and legal grounds; and yet there is no difference between such

an extortion and the requisition upon a land owner to pay for a public improvement over and above the exceptive benefit received by him."

State vs. Newark, 37 N. J. Law, 415.

"When the money of the few is taken for the benefit of the whole, it is in substance the exercise of despotic power. It is justice when an equivalent is given. In the case of a local improvement there is an equivalent for the assessment when it only equals the special benefit to the property benefited."

Barnes vs. Dyer, 56 Vermont, 469.

The condition of the law prior to the decision in the case of *Norwood vs. Baker* is summed up in 2 *Dillon, Municipal Corporations*, Section 761, as follows:

"Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest, and, to the extent of the special benefit, it is everywhere admitted that the legislature may authorize local taxes or assessments to be laid.

"When not restrained by the constitution of the particular State, the legislature has a discretion, commensurate with the broad domain of the legislative power, in making provision for ascertaining what property is specially benefited and how the benefit shall be apportioned.

"This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of the legislative power. The courts which have followed the doctrine of the leading case in New York have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority."

THE QUESTION IS SETTLED BY NORWOOD VS. BAKER, 172 U. S., 269.

The inexorable logic of this decision makes clear the following propositions:

The question of benefits is one of fact.

It is not within the purview of legislative power to determine facts.

If the legislature assumes to decide a question of fact, it acts, if it has any right to act at all, in a semi-judicial, and not in a legislative capacity. Its finding is an adjudication, and the power can only be effective when exerted in conformity with the safeguards which, under our system of government, hedge about the exercise of judicial power.

This case decides the following points:

1. "The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and, therefore, that the owners do not in fact pay anything in excess of what they receive by reason of such improvement."

2. "The exaction from the owner of private property of the cost of the public improvement in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property, for public use, without compensation."

3. A rule of assessment of benefits by the front foot is arbitrary, and its necessary operation is to exclude any inquiry as to special benefits.

The decision in this case is conclusive of the question at issue, and should put an end to all controversy on the subject.

Some contention has been made that this decision is not consistent with the earlier decisions of this Court. Even if such were the case, it would not detract from the authority of the later decision. An examination of the cases referred to shows, however, that the claim is without foundation. In each of the cases which are referred to as being inconsistent with *Norwood vs. Baker*, the statute under which the assessment was made provided the property owner with an opportunity of being heard, and the assessing body was empowered in proper cases to change the assessment whenever the facts shown warranted such a course. This Court was particular in each case to rest its decision upon this fact.

In *Davidson vs. New Orleans*, 96 U. S., 97, the Court holds that it is due process of law, within the meaning of the con-

stitution, when the statute requires that the fixing of a tax or assessment, before it becomes effectual, must be submitted to a court of justice, *with notice to the owners of the property, all of whom have the right to appear and contest the assessment.*

In *Spencer vs. Merchant*, 125 U. S., 345, it is held: "If the legislature of a State, in the exercise of its power of taxation, directs the expense of laying out, grading or repairing a street to be assessed upon the owners of lands benefited thereby, and determines the whole amount of the tax and what lands which might be so benefited are in fact benefited, *and provides for notice to and hearing of each owner at some stage of the proceedings*, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law, in violation of the fourteenth amendment to the constitution of the United States."

In *Walston vs. Nevin*, 128 U. S., 578, the Kentucky statute authorizing assessments for the cost of opening and improving streets was under consideration, and it was held that the act did not deprive the owners of their property without due process of law, and was not repugnant to the fourteenth amendment to the constitution of the United States. In speaking of the act, the Court says: "Unjust, unequal or arbitrary burdens are not authorized to be imposed by the terms of the act, *and opportunity is given to every party interested to be heard in opposition to the enforcement of the liability in the courts*, which are specifically authorized to make all corrections, rules and orders to do justice to all parties concerned."

In *Fallbrook Irrigation District vs. Bradley*, 164 U. S., 112, it is held: "Due process of law is furnished and equal protection of the law given in such proceedings, when the course pursued for the assessment and collection of taxes is that customarily followed in the State, *and when the party who may be charged in his property has an opportunity to be heard.*" It was made the duty of the assessing board, after hearing, to determine which lands would be benefited and which would not be benefited by the proposed improvement.

There is no decision of this Court prior to *Norwood vs. Baker*, which holds that an arbitrary rule of assessment made in advance, which does not provide for a hearing and furnishes no power in the assessing officer of changing or modifying the assessment, is valid or constitutional.

It is because of the absence of this opportunity of being heard and the want of power to make an assessment conform to the fact of benefit, that the Court, in *Norwood vs. Baker*, finds that the rule of assessment is arbitrary.

NORWOOD VS. BAKER IS SOUND IN PRINCIPLE.

Laying aside for the moment consideration of the conclusive character of the decision in *Norwood vs. Baker*, and the importance of adhering to the doctrine of *stare decisis*, there can be no doubt of the logical soundness of the conclusions reached and announced in that case.

It is now conceded, by modern cases at least, that the right to make local assessments rests upon the ground of special and peculiar benefit received by individuals, beyond that received by the public generally. It is obvious, therefore, that such right can only be supported to the extent to which benefits are conferred. The question is one of fact, and is an individual one in each instance. Its solution depends upon the peculiar circumstances of each case, and it cannot, from the nature of the subject, be decided in advance. Each individual has a right to be heard upon the proposition whether or not he is benefited by a particular improvement and to what extent, and he has a further right to be heard before a tribunal which is possessed of power to modify or change the assessment according to the facts shown. It is a question of private right, and to deny the right to be heard is to refuse the protection of the law. In one case the improvement might result in benefit to abutting property owners equal to or greater than the cost. In another the benefit might be slight although the cost might be great. The truth can only be ascertained by a consideration of the facts and circumstances by a tribunal informed of such facts and circumstances.

Under our system of government, the legislature, in the exercise of its legislative powers, cannot deprive any individual of his property without compensation and due process of law. The legislature can enact laws and lay down general rules for the making of local assessments and providing for assessing the costs against persons specially and peculiarly benefited. But these rules must be such that the person affected has an opportunity of being heard as to the question of benefits; and a rule which does not afford such opportunity, and does not also guard against assessment in excess of the actual benefits received, is arbitrary and void.

"Due process of law is a restraint on the legislative, as well as on the executive and judicial powers of the government."

Murray's Lessee vs. Hoboken Land & Improvement Co. 18 How., 276.
Ulman vs. Baltimore, 72 Md., 592.

"Due process of law is not confined to judicial proceedings. It extends to every case which may deprive the citizen of life, liberty or property, whether the proceeding be judicial, legislative or executive in its nature."

Weimer vs. Bunbury, 30 Mich., 201.
Davidson vs. New Orleans, 96 U. S., 97.
Dietz vs. Neenah, 91 Wis., 428.
Cooley, Constitutional Limitations, 355.

"An act of the legislature arbitrarily taking property for the public good and fixing the compensation to be paid, could not be upheld. It would in such case be the absence of that due process of law which both the Federal and State constitutions guarantee to every citizen. * * * The legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against a person without a hearing."

Stuart vs. Palmer, 74 New York, 191.
Remsen vs. Wheeler, 105 New York, 573.
In re Union College, 129 New York, 308.

"Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this. In his argument in the Dartmouth College case, Webster defines due process of law as 'a proceeding which proceeds upon inquiry and renders judgment only after trial.'"

Campbell vs. Dwiggins, 83 Ind., 482.

The tribunal charged with the duty of determining the benefits to be assessed, whether it be the legislature itself, if it can act at all, or a body specially designated for the purpose, does not act in a legislative, but in a semi-judicial capacity in reaching its conclusions. It seems entirely clear that the legislature is exceeding its powers if it attempts to determine in advance, as a fact, without any information as to any particular case, that in all cases in the future, whenever a street in a city is paved or otherwise improved, no matter whether in the outskirts or in its most densely populated portion; no matter what kind of pavement is laid or what its cost, or what the necessity of the improvement may be, each individual abutting property owner will in fact receive a benefit which is exactly proportionate to the frontage of his property abutting upon the portion of the street paved, whether the depth of the property be one foot or one thousand, and regardless of other considerations.

"Where the legislature has submitted these questions for inquiry to a commission or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial, in such a sense that the property owner is entitled to a hearing or to notice or an opportunity to be heard."

Parsons vs. District of Columbia, 170 U. S., 52.

The Supreme Court of Michigan, in a case in which it is held that an assessment to pay the cost of construction of a sewer, levied according to the superficial area of the lots, without regard to actual or probable benefits, is unlawful, in discussing the subject, says: "But as new legislation will probably be procured, it seems proper to declare in this case that parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage in the proceedings, before the tax shall become an established charge against them or their property."

Thomas vs. Gain, 35 Mich., 164.

In a similar case in Massachusetts it is said: "It is also contended by the petitioners that the statute gives owners of property no opportunity of being heard upon their liability to assessment. It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the legislature delegates the power, is a quasi-judicial proceeding, which cannot take final effect unless persons to be assessed have opportunity to be heard."

NORWOOD VS. BAKER HAS GENERALLY BEEN FOLLOWED BY THE COURTS.

In every instance since the decision above mentioned, where the question has arisen in the Federal courts, the rule announced in *Norwood vs. Baker* has been followed.

Loeb vs. Trustees of Columbia Tp., 91 F. R., 37 (W. D. of Ohio).

A paving case where the statute provided for the assessment of the entire cost on abutting property by front foot.

This case has recently come before this Court, and was disposed of upon other grounds than those stated in *Norwood vs. Baker*. The holding of the Court is that even if one section of the act authorizing assessments is invalid, that does not render the entire act void, and that bonds authorized by valid portions of the act can be sustained.

21 Supreme Court Reporter, 181.

Fay vs. Springfield, 94 F. R., 409 (W. D. of Missouri).

A paving case where the assessment was according to the front foot.

Charles vs. City of Marion, 98 F. R., 166 (Dist. of Indiana).

Also a paving case. This Court holds: "It is essential to due process of law that there shall not only be notice of a time and place for a hearing, but, what is more important, that there shall be a tribunal clothed with power, by methods and rules prescribed by law, to hear and determine the question involved."

Same case, 100 F. R., 538.

On final hearing, the rule above announced was reaffirmed, and it was further held that a notice of hearing to revise and correct a report and estimate of the engineer, to make the report conform to the prescribed basis of assessment, was not a notice of hearing as to the question of benefits.

Lyon vs. Tonawanda, 98 F. R., 361 (N. D. of New York).

A paving case which follows the rule of *Norwood vs. Baker*.

Cowley vs. City of Spokane, 99 F. R., 840 (E. D. of Washington).

A paving case following the rule of *Norwood vs. Baker*.

Parker vs. Detroit, 103 F. R., 357 (E. D. of Michigan).

Paving case in which the same provisions of the charter of the City of Detroit are involved as in the case at bar.

Bidwell vs. Huff, 103 F. R., 362 (S. D. of Georgia).

A paving case following *Norwood vs. Baker*.

Many of the State courts have also approved of the doctrine of *Norwood vs. Baker* and adopted it as the correct rule in such cases.

Hutcheson vs. Storrie, 92 Tex., 685.

In this case, on the authority of *Norwood vs. Baker*, the Supreme Court of Texas reversed a long line of decisions in that State holding a contrary rule.

Sears vs. Street Commissioners, 173 Mass., 350.
Adams vs. City of Shelbyville, 57 N. E. R., 114.
McKee vs. Pendleton, 57 N. E. R., 532.
Dexter vs. Boston, 57 N. E. R., 379.

In some of the State courts, where the question has arisen, the rule of *Norwood vs. Baker* is recognized, but it is held that the statutes involved contain such provisions for notice as to bring them within the principle of the decision.

Schroeder vs. Overman, 55 N. E. R., 158.
Adams vs. City of Shelbyville, 57 N. E. R., 114.
McKee vs. Town of Pendleton, 57 N. E. R., 532.
State vs. District Court, 83 N. W. R., 182.

In four instances the State courts have refused to follow the rule.

In the case at bar, the Supreme Court of Michigan say: "We should feel inclined to follow the opinion of the Supreme Court of the United States in *Norwood vs. Baker*, *supra*, inasmuch as it was based upon the fourteenth amendment to the constitution of the United States, if that were a paving case; but that was a street opening case, and until that court shall pass upon the question in the exact form in which it is here presented, we shall feel bound to follow our own decisions."

Cass Farm Co. vs. Detroit, 7 Detroit Legal News, 283.

The Supreme Court of Missouri has declined to follow the rule of *Norwood vs. Baker* in two recent decisions.

In one case, where an an assessment was levied according to area for the cost of a sewer, the Court says that the facts were different in the case before them, and that the decision in *Norwood vs. Baker* was by a divided Court, and was in conflict with the prior rulings of the Court.

Herman vs. Allen, 57 S. W. R., 559.

In a paving case, where the assessment was by the front foot under provisions of a charter affording no opportunity for a hearing, the same Court says: "It is, however, insisted that the Norwood-Baker case does condemn this front foot rule because it affords no opportunity for a hearing. Still, conceding, as we do, *that there were expressions to this effect in that opinion*, it seems clear to us that the opinion was not predicated upon want of notice. * * * We do not believe that the Supreme Court intended to lay down the law that a State statute imposing taxes must necessarily and in all cases give notice and a hearing to the taxpayer before it can be held valid."

Barber Asphalt Paving Co. vs. French, 58 S. W. R., 939.

The Supreme Court of North Dakota declined to follow the rule, upon the ground that the court does not believe that the Supreme Court of the United States intended to lay down so broad a rule.

Webster vs. City of Fargo, 82 N. W., 732.

The latter cases seem to be the only ones in which the doctrine of *Norwood vs. Baker* has been questioned since it was decided.

THE RULE OF THE DETROIT CHARTER IS CLEARLY ARBITRARY.

Section 35, Chapter 11 of the Charter provides: "The cost and expenses of such improvement * * * shall be assessed ratably according to their extent of front on the lots, parts of lots or parcels of real estate directly fronting on and within the local assessment district."

Section 37 provides "that the board of assessors shall then assess the cost and expenses of the work chargeable as aforesaid upon the property in said list ratably upon the several lots and parcels of real estate, according to the length of front thereof."

No latitude is permitted the assessors. It makes no difference whether they consider any particular lot benefited by the improvement or not. In all cases and under all circumstances the assessment must be pro rata according to the frontage.

It is said, however, that Section 37 provides for a notice. The provision referred to is that after the assessments have been made according to frontage, and the assessment roll completed, "said board shall give notice, by at least five publications in the city paper, that such roll is completed and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days said board shall, after any needful revision and correction of said roll, sign the same and report it to the Common Council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections; and when the same shall be corrected to the satisfaction of said council, it shall by resolution confirm the same."

This certainly is not an opportunity to show what benefits would result from the improvement, in order that the assessment may conform to the benefits received. The intention is plain that the purpose of the notice is to correct clerical errors

in the roll. If names are wrong, or measurements, these things can be corrected. This is the extent of the provision. The assessors know no other law than to arbitrarily assess the cost of the improvement according to the frontage, regardless of the question of benefits.

The United States Circuit Court of Indiana, in considering a similar claim of notice, says: "It is suggested in argument that the notice and hearing above provided for is such notice and hearing as constitute due process of law. The statute is mandatory in requiring the engineer to make his assessment and estimate upon the basis of assessing the whole cost of the improvement by the front line measurement; and as he is an officer acting under special delegated statutory authority, an assessment or estimate made by him on any other basis than that prescribed by the statute would be void. The matter referred to the consideration and judgment of the common council and its committee is the assessment and estimate so made by the engineer, and nothing else, and the only authority conferred upon the common council or a committee of that body is either to adopt that estimate, or else simply to make alterations in the estimate so made. Evidently the alterations contemplated are simply such alterations as are necessary to make the estimate of the engineer conform to the statute prescribing the method by which the engineer shall be governed in making the estimate. The statute does not purport to confer authority upon the common council to institute an inquiry *de novo*, and to hear witnesses and consider testimony for the purpose of fixing the assessment on the basis of the actual benefits received by the property of the land owner by the construction of the public improvement. * * * It is not sufficient, to constitute due process of law, that the statute provides for a hearing and notice. It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved."

Charles vs. City of Marion, 98 F. R., 166.
Same case, 100 F. R., 538.
Fay vs. Springfield, 94 F. R., 409.
Barnes vs. Dyer, 56 Vermont, 469.

It is difficult to imagine a case where individual rights have been disregarded to a greater extent than in the case disclosed by this record. The territory where the improvement was made was unsettled. No property owner asked for the pavement. The Common Council, of its own motion, ordered the improvement and directed that a pavement suitable for the most densely populated portion of the city should be laid. The contract was let against the repeated vetoes of the mayor. The

pavement was laid in midwinter, in extremely cold weather, and outside of the time prescribed by the charter, and at no stage of the proceedings did any of the persons upon whom the entire cost of the improvement was imposed, have any voice in the matter. When such high-handed and arbitrary action is taken, the persons affected have the right to the full protection of every rule of law.

It is respectfully submitted that the judgment of the Supreme Court of Michigan should be reversed.

~~HENRY M. CAMPBELL,~~
Counsel for Plaintiffs in Error.

Henry M Campbell
Counsel for Plaintiffs in Error

Office Supreme Court U.S.
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JAMES H. M. KENNEY
Clerk.

No. 411. and 508.

Brief of Joslyn for City of Detroit

Supreme Court of the United States

October Term, 1900.

Filed Feb. 25, 1901.

No. 411.

THE CITY OF DETROIT, THOMAS M. LUCKING AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

No. 508.

CASS FARM COMPANY (LIMITED); J. O. HARRIS, BRYANT WALKER, ET AL., PLAINTIFF IN ERROR.

vs.

CITY OF DETROIT, THE BOARD OF PUBLIC WORKS OF DETROIT, D. W. H. MORELAND, ET AL.

In Error to the Supreme Court of the State of Michigan.

BRIEF OF C. D. JOSLYN

FOR CITY OF DETROIT.

30758

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In Error to the Supreme Court of the State of Michigan.

BRIEF FOR APPELLANT.

From those allegations in the bill and answer in the cause first entitled above, which were taken as true, and from the proofs taken, the following facts appear:

The bill of complaint was filed to set aside certain assessments and tax sales of the appellee's land for delinquent taxes or assessments levied, one to defray the cost of grading and paving Woodward avenue and the other to defray the cost of grading and paving Blaine avenue, both in the City of Detroit. The two improvements and the assessments therefor were separate proceedings had at different times.

Woodward and Blaine avenues run at right angles to each other and intersect. The property of the appellee is situated at the southwest corner of said intersection, and consists of a house and lot, the latter having a frontage of 68.89 feet on Woodward and 200 feet on Blaine avenue. Its value is $10,000 and upwards. The other lots on Blaine avenue are 127½ feet deep, with a frontage varying from 40 to 50 feet. A map is herewith attached showing the location of the property.

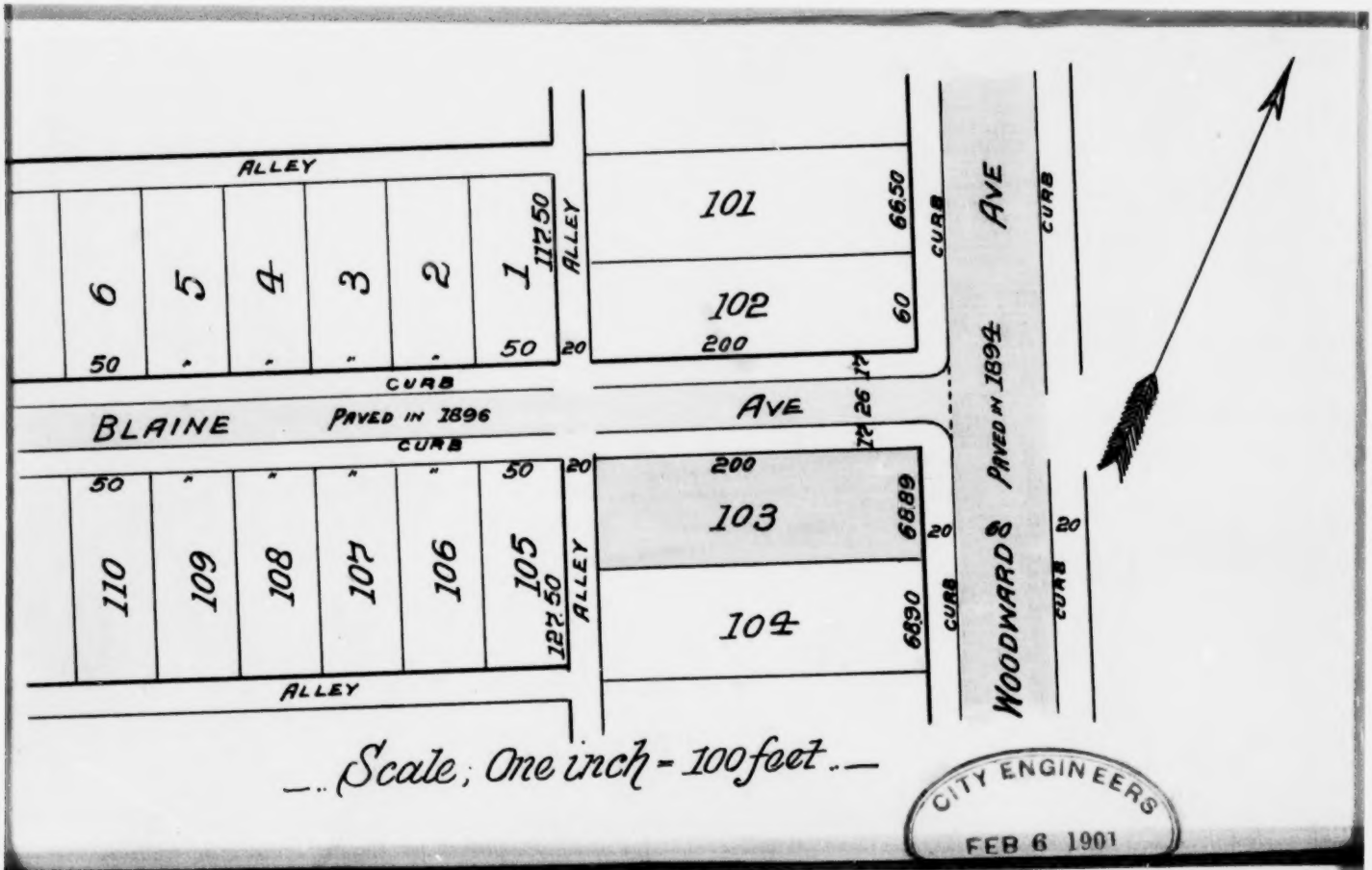
In December, 1892, the Common Council of the City of Detroit ordered Woodward avenue to be graded and paved from Pallister avenue to the Joy road, and in March, 1893, a contract to perform said work was let for the sum of $55,634.78. An assessment roll in four parts was duly made and the entire cost of the improvement, less the cost of grading and paving the intersection of streets and alleys, was assessed against the property, including that of the appellee, abutting on the improved portion of the street, *pro rata*, according to the frontage thereof on Woodward avenue. The amount assessed against the property of the appellee was $491.44, but he did not pay it, nor any part thereof, so on the 25th day of March, 1897, his said property was sold for the delinquent taxes, and was bid off to the City of Detroit. The time for redemption expired a year later, under the law, and said sale has now become absolute.

In February, 1896, Blaine avenue was similarly ordered to be graded and paved and a contract was duly let to perform said work for the sum of $11,462.32. Another assessment roll to defray the cost of the latter improvement was also duly made in four parts against the property, including that of the appellee, abutting on the portion of Blaine avenue thus improved, in the same manner as the assessment was made on Woodward avenue. The amount assessed the property of the appellee, for this improvement, was $442.68. The appellee did not pay this assessment, nor any part of thereof, so as each part became delinquent, the property was sold for such delinquency, and the sales for the first three parts have become absolute. The property was bid off to the City of Detroit, there being no other bidders.

The statutes under which these proceedings were had are a part of the charter of the City of Detroit, two copies of which we produce for the use of the Court.

Section 6 of Chapter 11 of the charter, being Compilers' Section 188, prohibits grading and paving to an extent exceeding $200,000 in any one year except upon the petition of the holders of the greater portion of the lands abutting on the part of the street proposed to be improved.

Section 33 of Chapter 11, being Compilers' Section 215, provides for entering into contracts for grading and paving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108
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106
105
127.50
ALLEY
103
68.89
104
68.90
ALLEY
50
20
200
Scale; One inch - 100 feet
CITY ENGINEERS
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and for assessing the cost upon a local district. The portion of the section which bears upon the question under discussion is as follows:

> Sec. 33. Whenever the Common Council shall order any street or any portion thereof to be graded, or graded and paved, or repaved, it may enter into contract for the making of such improvement according to the provisions of this charter, and after the cost and expense thereof has been ascertained, it shall cause the same, except the cost of repaving, the cost of crosswalks, and of the work at the intersections of cross streets, to be assessed upon the lots and real estate herein made subject to such assessment as hereinafter provided. * * *

Section 39, Compilers' Section 216, provides that the property abutting on the unpaved portion of the street shall constitute one local assessment district, but gives the Common Council power to subdivide into two or more assessment districts. A portion of it is as follows:

> Sec. 34. For the purpose of such assessment, the lots and parcels of real estate situated on said street and fronting the portion thereof ordered to be improved, shall constitute one local assessment district, unless the Common Council, with a view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts. Such subdivision, if made, must be done before asking bids for the work: and in no case shall a city block be divided in making such division. * * *

Section 35, Compilers' Section 217, provides for an assessment *pro rata*, according to frontage, and provides for relief where assessment is unjust because of irregular shaped lots.

> Section 35. The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for the crosswalks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably, according to their extent of front on the lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district: Provided, that if the assessment made on any such lot, or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the Common Council to be inequitable, said council may direct a just portion of such assessment to be paid out of the general road

fund. * * * The word "front" as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved.

Section 36, Compilers' Section 218, points out how to assess land not platted into lots.

Whenever in the improvement of a street as aforesaid, any land or real estate which has not been duly platted into city blocks or lots, shall be required to be assessed to pay any part of the cost of such improvement, the council shall designate such part or parts thereof for such assessments as shall correspond as near as practicable to the portions of the block or blocks nearest adjacent thereto, subject to like assessment, and the part or parts so designated shall be assessed as near as may be in the manner herein provided for the assessment of lots.

Section 37, Compilers' Section 219, is quoted in full. It is the only provision of law relative to notice to the taxpayers, and a question is raised as to its sufficiency under constitutional rule.

Sec. 37. The Board of Assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate, constituting a local assessment district as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate, so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper, that such roll is completed, and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of such roll, sign the same and report it to the Common Council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections. And when the same shall be corrected to the satisfaction of said council, it shall, by resolution, confirm the same.

> After such confirmation, such assessment shall constitute a lien, until paid, upon said lots or parcels of real estate, and shall be collected in such manner as may be authorized by law.

With the foregoing facts and charter provisions before it, the Circuit Court below granted a decree for the complainant, cancelling the assessments and setting aside the sales for delinquent taxes.

With respect to the facts in cause No. 511, submitted herewith, we are content with the statement made in the brief of Messrs. Russel & Campbell. It is claimed in both cases that the assessments complained of were in violation of the XIV. amendment of the Constitution of the United States.

As we understand it, there are but two propositions presented: First, a statute, directing an assessment to defray the cost of grading and paving a street to be made *pro rata* according to the frontage of the property assessed, excludes any consideration of benefits and is therefore unconstitutional.

Second, that the statute under consideration provides no opportunity for the persons assessed to be heard on the question of benefits, and therefore a proceeding under it, is in this respect, taking property without due process of law, and violates the XIV. amendment to the Constitution of the United States.

There have been so many recent decisions in different parts of the country by Circuit Courts of the United States and by some State Courts which seem to hold that the main question here presented has been disposed of by the decision in the case of Norwood vs. Baker, 172 U. S., page 269, that we have approached the discussion of the question with considerable embarrassment, but the recent decision in the case of Loeb vs. Trustees of Columbia Township, decided last December by this Court, if we correctly understand it, relieves us somewhat of our embarrassment and shows that the question is still open for discussion.

As we understand the import of the decision in the case of Norwood vs. Baker, it was not intended to overrule any previous decision of this Court, but simply held that there are limitations upon the power of the Legislature, even in regard to taxation, which the judiciary ought to, and will, enforce in a proper case, or to use the better language of the opinion, "the power of the Legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizens' right of property."

In the case referred to there was a proceeding under the power of eminent domain by which Mrs. Baker's property was

taken from her for public use and for which it was pretended to give her adequate compensation, but the proceedings which followed, in the exercise of the power of taxation, took away this compensation and added to the injury by assessing her the cost of the proceedings besides. In other words, there was a dove-tailing of two proceedings, one under the power of eminent domain, and the other under the power of taxation, and when combined, the result was that Mrs. Baker had not only been deprived of certain land which she owned, but had been compelled to pay the expense of taking it away from her,—a result which ought not to be tolerated in any country where justice reigns. We think the transaction was well described by the counsel for Mrs. Baker when he said: "The case would not be any different if its council, after the condemnation proceedings and after the payment of the money to complainant, knowing it to be in her house, had left the council chamber, gone to her dwelling, demanded of her that she give the money back to the town, and refusing to do so, had taken it from her."

The exact counterpart of this case was attempted some years ago in the State of Michigan, where, in speaking of the facts, the Court said: "The result of all this was, not only that the Scripps property was taken without compensation, but they were assessed $115 for the privilege of having it done. They appeal on various grounds, among other things, the right to allow such results to be reached. The injustice of the finding is so monstrous that we should have no hesitation in setting it aside under the general power given us to review such proceedings."

City of Detroit vs. Daly, 68 Mich., at page 506.

We think, too, that the proceedings under the Norwood case were had under a statute which permitted municipalities to make an assessment without any consideration of benefits. And here we may as well admit at the outset of the discussion that, if this Court can say that the assessments in the cases at bar were levied under a rule which had no regard whatever to the benefits received by the property assessed, then they must go down.

> "The Legislature, in the exercise of the right of taxation, has the authority to direct the *whole or such part as it may prescribe* of the expense of a public improvement such as the establishing, the widening, the grading or the repair of a street to be assessed upon the owners of land benefited thereby."
>
> Bauman vs. Ross, 167 U. S., at page 589.
> Davidson vs. New Orleans, 96 U. S., 97.
> Hagar vs. Reclamation Dist., 111 U. S., 701.
> Spencer vs. Merchant, 125 U. S., 345.

Wallston vs. Nevin, 128 U. S., 578.
Lent vs. Tillson, 140 U. S., 316-328.
Ill. Cen. R. R. vs. Decatur, 147 U. S., 190.
Paulsen vs. Portland, 149 U. S., 30.

Also

Willard vs. Presbury, St. U. S., 14 Wall., 676.
Mattingly vs. Dist. Columbia, 97 U. S., 687.
Shoemaker vs. United States, 147 U. S., 282.

To determine the amount of taxes to be levied upon a local taxing district is, under all constitutional rules, equivalent to determining the amount of benefits which the district has received or will receive from the improvement for which the tax is proposed to be levied.

It will be conceded as a general proposition that the Legislature may fix a local taxing district and apportion an assessment to be levied upon it, provided it makes it according to benefits and that, under this rule, it may assess upon the district the entire cost of the improvement for which the assessment is made. The question then, before us, is this: can the Legislature establish a rule for assessment in advance of making the improvement, or must it wait until the cost of the improvement has been ascertained? Has not this Court answered this question?

> "The class of lands to be assessed for the purpose may be either determined by the Legislature itself by defining a territorial district or by other designation, or it may be left by the Legislature to the determination of commissioners and be made to consist of such lands and such only as the commissioners shall decide to be benefited."

Spencer vs. Merchant and Shoemaker vs. United States, above cited, and
Fallbrook Irrig. Dist. vs. Bradley, 164 U. S., 112, 167, 168, 175, 176.
Utman vs. Baltimore, 165 U. S., 719.

See also People vs. Brooklyn, 4 Comst. (N. Y)., 419, approved by this Court.

> "The rule of apportionment among the parcels of land benefited, also rests within the discretion of the Legislature and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

Mattingly vs. Dist. Columbia,
Spencer vs. Merchant,
Wallston vs. Nevin,

Lent vs. Tillson,
Paulsen vs. Portland,
Fallbrook Irrig. Dist. vs. Bradley,

above cited.

It ought to be assumed, we think, that the Legislature is informed of the general condition of the cities and villages which it has created, and of their needs, and it may be presumed to legislate fairly with regard to them. We think it is not to be supposed that a Legislature, in prescribing how local assessments shall be made for grading and paving streets in one of the municipalities of the State, acted without knowledge on the subject, nor that it acted capriciously or wantonly. There is evidence before this Court in the charter provisions themselves, which we have quoted, that the Legislature of the State of Michigan took considerable pains to prevent injustice so far as it could. For instance, it provided that in grading and paving a street it might divide the work into sections and make separate assessment rolls for each section, so that if the expense of grading one portion of a street should be greater than that of another, the assessment could be correspondingly adjusted.

Sec. 34, quoted herein.

Another provision gives the Common Council power to relieve where the assessment appears to be unjust, because of the irregularity in the shape of any lot.

Sec. 35.

Still another provision is with reference to lands that are not platted into lots, giving the council power to designate as abutting property to be assessed a sufficient amount of the unplatted land as shall correspond, as near as practicable, to that portion of the assessment district platted into lots.

Sec. 36.

It also provides that the city shall not grade and pave to an amount exceeding $200,000 in any one year, except upon petition of the holders of the greater portion of the land fronting on the proposed improvement.

Sec. 6, 188.

We speak of these provisions merely to demonstrate that the legislation was neither careless, capricious nor wanton.

The Legislature divides the State into counties. Each county, for many purposes, is a local assessment district, and the Legislature provides in advance what may be assessed upon that district. It also divides counties into townships, which

are likewise local assessment districts for certain purposes. It also provides in advance what may be assessed upon them. Townships are subdivided into road districts, each one of which is a local assessment district, and the statute provides in advance what may be assessed upon each one of these. The township is also divided into school districts, and each one of these school districts is a local assessment district, and the Legislature provides in advance what may be assessed upon these. Each one of these districts is authorized in advance to make certain improvements and to assess the cost of those improvements upon the district. The Legislature may specifically authorize the construction of a bridge, mark out the local assessment district for it and direct in advance that the entire cost of the bridge be levied upon it.

All these things are necessary to the proper conduct of the internal affairs of the State and its many subdivisions. Although many technical questions have arisen over the administration of these powers, yet we are not aware that the power of the Legislature to do these things in advance has been questioned.

In the organization of a great city it is always necessary to lay down some rules and make some provisions for the conduct of its internal affairs. Streets must be paved, improved, repaired and maintained. Sewers must be constructed. Many other improvements must be made. It is conceded that the cost of all these things may be assessed upon the property which has been or will be specially benefited by these improvements to the amount of the benefits. This has been directed by the Legislature of Michigan with reference to the City of Detroit. This Court is now asked to say that in laying down rules by which the City of Detroit is to be guided in making assessments for grading and paving its streets, the Legislature, in defining the limitations of taxing districts therefor and directing that the whole of the cost to be levied thereon did not or could not take into consideration the benefits accruing to the district from such improvement. Is it impossible for the Legislature to make this determination, or must the assessment for benefits be left to the ever-varying discretion of some local officer or board?

It will be conceded, we suppose, that the Legislature might have provided the rule in advance that the entire cost of any specific grading and paving should be assessed upon the whole city. Does its power to do so disappear with the attempt to make the taxing district less in size than the entire city? The city is divided into seventeen wards, each one of which is locally assessed for what is now the ward road district fund. Had not the Legislature power to grant such an authority? If the Legislature may in advance make the city one assessment district,

may it not make a ward a local assessment district, or are we to say that the power of the Legislature to make a rule in advance, upon this subject, depends upon the size of the assessment district?

A large number of courts and many Legislatures have made a distinction between assessments for benefits derived from opening a street and assessments for benefits derived from grading and paving a street after it is opened. The Michigan Legislature, with reference to street openings in the City of Detroit, instead of fixing a taxing district and directing a portion to be spread thereon, has left the determination of these questions to the Common Council, but with regard to grading and paving, has defined the rule of assessment itself and fixed the district, and the Supreme Court of Michigan has repeatedly held that assessments thus directed by the Legislature to be made according to frontage are valid.

Williams vs. Mayor, 2 Mich., 560.
Motz vs. Detroit, 18 Mich., 495.
Sheley vs. Detroit, 45 Mich., 431.
Kalamazoo vs. Francois, 115 Mich., 554.
Cass Farm Co., Ltd., vs. Detroit, 7 Detroit Legal News, p. 281.

the latter being one of the cases now being considered here.

With regard to street opening assessments it has made a different determination.

Detroit vs. Judge of the Recorder's Court, 112 Mich., 588.

The writer has often thought that perhaps it has been the marked distinction between the different kinds of improvements that has led to the apparent confusion on the subject of local assessments.

For instance, it seems to be almost universally recognized that grading and paving a street in a large city is certain to benefit the abutting property, while opening a street through a piece of property and taking a part of it may or may not benefit that which remains.

To illustrate in a specific way: In the case of Norwood vs. Baker, a highway was opened through Mrs. Baker's property connecting streets which led up to it on either side, affording greater convenience to the property adjoining Mrs. Baker's and to the public at large. It seems to us that it is purely arbitrary to say under such circumstances that the abutting land of Mrs. Baker was the only property specially benefited by the improvement. The streets may have been laid out about her land in such a way that no new street, so far as her land was concerned, was necessary. Again, her land might have been situated so that cutting a highway through a portion of it or

through the middle of it would destroy the market value of the remaining land. It would seem to be certain that whether opening a street is a direct benefit to the abutting land or not must always depend upon circumstances. This cannot be said of grading and paving a street. It may be fairly asserted of this improvement that it always benefits the abutting property. In Detroit, under the law, most of it is done at the request of the property holders.

It may be argued that there might now and then be a case where the benefits would not equal the cost of the improvement and possibly this may be so, but these could only be regarded as exceptions to the general rule.

As to the second proposition, which relates to the question of the right of the taxpayer to be heard on the question of benefits and also involves the question of notice, there is very little to be said.

With regard to local assessments, three things are required to be done.

First. Fixing the local assessment district.

Second. Determining the amount or portion to be spread upon such district.

Third. Apportioning the amount determined upon among the different parcels of land in the district.

It has been shown already that the first two questions are purely legislative and cover the question of benefits. They are legislative because they are questions of public policy. The question of whether or not a tax shall be raised and how much is always a public and legislative question in which all alike are interested, but when these legislative determinations have been made and the proper board or officer proceeds to carry them into effect by making a tax roll which describes the individual properties to be taxed and sets forth and apportions the amount of the tax on each, then the proceedings reach the individual and before such tax can be enforced against him or made a lien upon his property, he certainly has a right to be heard. He has a right to know whether the tax ordered by the Legislature has been equally and properly apportioned between him and his neighbors.

This opportunity has been provided for by the charter provision which has been cited. This section provides that the Board of Assessors, after completing the roll, shall give notice by at least five publications that such roll is completed and will remain in their office from the first publication of said notice for the inspection of all concerned. After any needful correction and revision is made, it is then sent to the Common Council for confirmation. That body is also given the power to direct

further correction to be made. This provision has been construed by the Michigan Supreme Court as giving taxpayers a chance to be heard.

Beecher vs. Detroit, 92 Mich., at page 274.
Voigt vs. Detroit, 7 Det. Legal News, page 23.

As to the proposition that the taxpayer is entitled to be heard upon legislative questions, such as the first two stated above, we are not aware that it is sustained by any authority, but whether it is or not, we suppose this Court has settled that question.

> "If the Legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Spencer vs. Merchant, already cited.
McMillan vs. Anderson, 95 U. S., at page 37.
Davidson vs. New Orleans, already cited.
Hagar vs. Reclamation Dist., above cited.

Notice by publication is sufficient.

Davidson vs. New Orleans.
Spencer vs. Merchant.
Lent vs. Tillson.
Paulsen vs. Portland.
Fallbrook, etc., vs. Bradley.
Already cited.

In conclusion, the case before us seems to be this.

The complainant neglected to pay his taxes for several years and then comes into court, without alleging that any wrong has been done him, without alleging that the taxes levied were unjust or even burdensome, without making any claim of oppression, and so far as the record discloses without even availing himself of the opportunity which the law afforded him to go before the board of assessors or the common council and complain, without showing that his property or any portion of it has been taken from him wrongfully, and asks that the taxes be cancelled and that the tax sales be set aside. He makes no complaint of any irregularity in the proceedings, but bases his whole claim upon the bare proposition that a rule adopted by the Legislature, directing an assessment to defray the cost of grading and paving the street in front of his property to be assessed pro rata according to frontage, excludes any consideration of benefits and is, therefore, unconstitutional.

This doctrine is revolutionary, and as we understand it, is not in accord with the cases adjudicated by this Court. Moreover, it is a dangerous innovation of the legislative domain. The judiciary cannot inquire into this question without determining what the benefits were and whether there were any. If it can do this with the legislative assessment it seems to be clear that it may make the same inquiry with reference to an assessment made by the local board or officer. The final result of it all would be that the judiciary would be called upon to determine in every contested case the question of benefits, and each case would, under the claims made by complainant, present a Federal question, to be finally determined by this Court. As we understand the import of the Norwood decision, it simply determines that there had been an abuse of legislative power, and that the language of the Ohio statutes permitted the local body to make an assessment without considering the benefits. The very language of the statute indicates that.

It gives the council an option to assess according to benefits received or to do something else, allowing the council to determine which method it would adopt. This would be an assessment without regard to benefits. We know of no decision which permits this to be done. We suppose the doctrine to be that the courts may inquire into the question of an abuse of legislative discretion, precisely as a superior court may inquire into the abuse of discretion by an inferior court. In either case, unless such an abuse clearly appears, the exercise of discretionary power is not interfered with.

In Pennsylvania a distinction is made between urban and suburban highways, where it is held that assessments, by frontage, within cities are just and proper, while it is "ruinously unjust" when applied to farm lands outside of cities. While other courts reject this distinction it must be admitted there is much force in the reasoning which makes it.

Seely vs. Pittsburgh, 82 Pa. St., 360.

Kentucky and Iowa courts have made distinctions of a similar character. But we speak of these merely as illustrative of what we think is the proper rule relative to interference with legislative discretion; viz., that it must clearly appear that there has been an abuse of it.

If the Legislature adopts a rule of assessment which, *on its face*, or which in its certain operation provides for the "exaction, from the owner of private property, of the cost of a public improvement in *substantial* excess of the special benefits accruing to him, is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use with-

out compensation," and for that reason, is an abuse of legislative discretion.

Does the rule that the cost of grading and paving a street may be assessed upon the abutting property according to frontage, herein complained of, come within the foregoing classification? We submit that it does not.

It is common knowledge that grading and paving a street does always improve and benefit the abutting property. Is it for the Court or the Legislature to say how much the benefit is?

But the complainant is pursuing a shadow. If the present rule be set aside, it follows that the benefits must be determined by some local board. That board is subject to constant change. The amount of benefit received from a public improvement is always a matter of opinion. The opinion of a local board this year may not be the same as the new one next year. If each individual case is to be determined by itself as it occurs, then whim, bias, prejudice, self-interest, political influence will to a greater or less extent enter into the determination of benefits. How much better to lay down a fixed rule which applies to all cases of like character and which courts recognize as "more just than any other."

Williams vs. Mayor, etc., 2 Mich., 560.
Sheley vs. Detroit, 45 Mich., 431.

Is not the adoption of such a rule far preferable in all cases where it can safely be done?

Nothing can be gained by leaving the determination of benefits to a local board. Its determination will be final and not subject to judicial review, except for precisely the same reason that the legislative determination can be reviewed, viz: that it has abused its discretion.

In the court below, the question was asked if the Common Council could not, under our theory, pave a street with gold and assess the cost upon the abutting property. It certainly could not. That would be an abuse of discretion. But it could be done just as well under the rule for which they contend as under the rule which they assail. In any event, the determination of the benefits must be left to the discretion of some one and that determination is final, except it is made to appear that there has been an abuse of discretion.

If the local body is controlled by a fixed rule which is known and recognized as a just one in the long run, is it not better for all concerned, and especially for those who are to be taxed?

C. D. JOSLYN,
Of Counsel for City of Detroit.

Supreme Court of the United States.

No. 508.—October Term, 1900.

The Cass Farm Company, Limited, and others, vs. The City of Detroit and others. } In error to the Supreme Court of the State of Michigan.

[April 29, 1901.]

Mr. Justice Shiras delivered the opinion of the Court.

A bill in equity was filed in September, 1898, in the circuit court for the county of Wayne, State of Michigan, by the Cass Farm Company, Limited, and others, owners of lands lying and abutting upon Second avenue in the city of Detroit, against said city, the board of public works, and the Alcatraz Asphalt Paving Company, whereby it was sought to enjoin the city of Detroit from paving a portion of Second avenue, and to have the proceedings taken with reference to said paving declared void.

There was a decree in the circuit court in favor of complainants, and thereupon the case was taken to the Supreme Court of the State of Michigan, where the decree of the trial court was reversed, and a decree was entered dismissing the complainant's bill with costs of both courts.

We learn from a statement in the opinion of the Supreme Court that among other grounds of relief stated in the bill was the following:

"That the provisions of the charter and of the paving ordinances of the city, in so far as the same provide for an asssessment of the cost of paving upon the abutting property in proportion to the frontage of such property, were in violation of the Constitution of the United States and the amendments thereof, and therefore null and void."

The State Supreme Court disposed of this contention in the following language:

"In paving cases the rule has been settled in this State by many decisions that it is competent for the legislature to authorize the cost of paving streets to be assessed upon the abutting property according to frontage.

"It was said by Mr. Justice Cooley in *Sheley* v. *Detroit*, (45 Mich. 495):

"'We might fill pages with the names of cases decided in other States which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to question. Writers on constitutional law, on municipal law and on the law of taxation have collected the cases and have recognized

the principle as settled; and if the question were new in this State we might think it important to refer to what they say; but the question is not new. It was settled for us thirty years ago.'

"We should feel inclined to follow the opinion of the Supreme Court of the United States in *Norwood* v. *Baker*, inasmuch as it was based on the Fourteenth Amendment of the Constitution of the United States, if that were a paving case; but that was a street opening case, and until that court shall pass upon the question in the exact form in which it here presented, we shall feel bound to follow our own decisions." (*The Cass Farm Improvement Co. et al.* v. *The City of Detroit et al.*, —— Mich. ——.)

We have recently held that it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood* v. *Baker*. (*French* v. *Asphalt Paving Co.*, *Tonawanda* v. *Lyon*, *Wight* v. *Davidson*, 181 U. S.—.)

We are not convinced, by anything appearing in this record, that the complainants have entitled themselves to the interference of this court. As held by the Supreme Court of their own State, the proceedings to enforce the payment of their proportion of a common burden have been conducted in due regard to the forms and provisions of the statutes and ordinances applicable to the facts of the case, and disclose no departure, actual or intended, from constitutional principles.

The judgment of the Supreme Court of the State of Michigan is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

OCTOBER TERM, 1900.

The Cass Farm Company, Limited, and others, 508 *vs.* The City of Detroit and others.	In error to the Supreme Court of the State of Michigan.
The City of Detroit and others, Appellants, *vs.* 411 Ralzemond A. Parker.	Appeal from the Circuit Court of the United States for the Eastern District of Michigan.
Mortimer Webster, Plaintiff in Error, *vs.* 378 The City of Fargo and others.	In error to the Supreme Court of the State of North Dakota.
John L. Shumate, Plaintiff in Error, *vs.* 550 August Heman.	In error to the Supreme Court of the State of Missouri.
James L. Wormley, Plaintiff in Error, *vs.* 101 The District of Columbia. Anna P. Hoover Allen and others, Plaintiffs in Error, 102 *vs.* The District of Columbia.	In error to the Court of Appeals of the District of Columbia.
Thomas F. Farrell et al., Plaintiffs in Error, 201 *vs.* The West Chicago Park Commissioners.	In error to the Supreme Court of the State of Illinois.

[April 29th 1901.]

Mr. Justice HARLAN, (with whom concurred Mr. Justice WHITE and Mr. Justice MCKENNA) dissenting.

The controlling question in each of the above cases is the same as is presented in *French* v. *Barber Asphalt Paving Company*, *Wight* v. *Davidson* and *Town of Tonawanda* v. *Lyon*, just decided. For the reasons stated in my opinions in those cases, I dissent from the opinions and judgments of the court in the above cases.